No. 16-349
Title: Ricky Henson, et al., Petitioners
v.
Santander Consumer USA Inc.
Docketed: September 16, 2016
Linked with 16A12
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (15-1187)
Decision Date: March 23, 2016
Rehearing Denied: April 19, 2016
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jul 1 2016	Application (16A12) to extend the time to file a petition for a writ of certiorari from July 18, 2016 to August 17, 2016, submitted to The Chief Justice.
Jul 5 2016	Application (16A12) granted by The Chief Justice extending the time to file until August 17, 2016.
Aug 3 2016	Application (16A12) to extend further the time from August 17, 2016 to September 16, 2016, submitted to The Chief Justice.
Aug 4 2016	Application (16A12) granted by The Chief Justice extending the time to file until September 16, 2016.
Sep 16 2016	Petition for a writ of certiorari filed. (Response due October 17, 2016)
Sep 27 2016	Order extending time to file response to petition to and including November 16, 2016, for all respondents.
Nov 16 2016	Brief of respondent Santander Consumer USA Inc. in opposition filed.
Nov 30 2016	DISTRIBUTED for Conference of January 6, 2017.
Nov 30 2016	Reply of petitioners Ricky Henson, et al. filed. (Distributed)
Jan 9 2017	DISTRIBUTED for Conference of January 13, 2017.
Jan 13 2017	Petition GRANTED.
Feb 2 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Feb 2 2017	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the respondent.
Feb 17 2017	SET FOR ARGUMENT ON Tuesday, April 18, 2017.
Feb 17 2017	Joint appendix filed. (Statement of costs filed.)
Feb 17 2017	Brief of petitioners Ricky Henson, et al. filed.
Feb 22 2017	Record requested from the U.S.C.A. 4th Circuit.
Feb 22 2017	Record received from the U.S.C.A. 4th Circuit. The record is electronic and available on PACER.
Feb 24 2017	Brief amici curiae of States of Oregon, et al. filed.
Feb 24 2017	Brief amicus curiae of Public Counsel filed.
Feb 24 2017	Brief amici curiae of Jerome N. Frank Legal Services Organization at Yale Law School, et al. filed.
Feb 24 2017	Brief amici curiae of National Consumer Law Center, et al. filed.

Mar 20 2017	Brief of respondent Santander Consumer USA Inc. filed.
Mar 22 2017	CIRCULATED.
Mar 27 2017	Brief amici curiae of The Clearing House Association L.L.C., et al. filed. (Distributed)
Mar 27 2017	Brief amicus curiae of ACA International filed. (Distributed)
Mar 27 2017	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed. (Distributed)
Apr 3 2017	Reply of petitioners Ricky Henson, et al. filed. (Distributed)
Apr 18 2017	Argued. For petitioners: Kevin K. Russell, Bethesda, Md. For respondent: Kannon K. Shanmugam, Washington, D. C.
Jun 12 2017	Adjudged to be AFFIRMED. Gorsuch, J., delivered the opinion for a unanimous Court.
Jul 14 2017	JUDGMENT ISSUED.

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RECORD AND BRIEFS

16-349

No. 16-___

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IN THE

Supreme Court of the United States

RICKY HENSON, IAN MATTHEW GLOVER, KAREN PACOULOUTE, F/K/A KAREN WELCOME KUTEYI, AND PAULETTE HOUSE,

Petitioners,

v.

SANTANDER CONSUMER USA, INC., COMMERCIAL RECOVERY SYSTEMS, INC., AND NCB MANAGEMENT SERVICES, INC.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, regulates the conduct of "debt collector[s]." Respondent Santander Consumer USA, Inc., is in the business of purchasing defaulted debt for pennies on the dollar then attempting to collect on that debt from the defaulting consumer. The Question Presented, upon which the circuits are deeply divided, is:

Whether a company that regularly attempts to collect debts it purchased after the debts had fallen into default is a "debt collector" subject to the Fair Debt Collection Practices Act?

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Other Authorities

Amicus Brief of the Federal Trade Commission Supporting Rehearing En Banc, *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309 (11th Cir. 2015) 17, 19, 27

CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts, *available at* http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf 28

Consumer Financial Protection Bureau, Fair Debt Collection Practices Act: CFPB Annual Report 2014 (March 2014), *available at* http://files.consumerfinance.gov/f/201403_cfpb_fair-debt-collection-practices-act.pdf 4

Consumer Financial Protection Bureau, Fair Debt Collection Practices Act: CFPB Annual Report 2016 (March 2016), *available at* http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf 19, 22, 28

Federal Trade Commission, Collecting Consumer Debts: The Challenges of Change – A Workshop Report (February 2009), *available at* https://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf 20, 27

Federal Trade Commission, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration (July 2010), *available at* www.ftc.gov/os/2010/07/debtcollectionreport.pdf 27

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Rick Jurgens & Robert J. Hobbs, Nat'l Consumer Law Ctr., The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts, at 18 (July 2010), *available at* https://www.nclc.org/images/pdf/debt_collection/debt-machine.pdf..... 21

Release, CFPB, CFPB Takes Action Against the Two Largest Debt Buyers for Using Deceptive Tactics to Collect Bad Debts, *available at* http://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-the-two-largest-debt-buyers-for-using-deceptive-tactics-to-collect-bad-debts..... 21

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Ricky Henson, Ian Matthew Glover, Karen Pacouloute, f/k/a Karen Welcome Kuteyi, and Paulette House respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is published at 817 F.3d 131. The opinion of the district court (Pet. App. 21a-40a) is unpublished but available at 2014 WL 1806915.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2016. Pet. App. 1a. The court of appeals denied petitioner's timely petition for rehearing en banc on April 19, 2016. Pet. App. 41a-42a. On July 5, 2016, the Chief Justice extended the time to file this petition through August 17, 2016. No. 16A12. On August 4, 2016, the Chief Justice further extended the time to file this petition through September 16, 2016. *Id.* This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 1692a of Title 15 provides in relevant part:

> (4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of

facilitating collection of such debt for another.

* * *

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is *the collection of any debts, or who regularly* collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a *third person* is *collecting* or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related

or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

STATEMENT OF THE CASE

In 1977, Congress enacted the Fair Debt Collection Practices Act in light of "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). The Act distinguishes between "debt collectors," who are subject to the statute, and "creditors," who generally are not. *See id.* § 1692a(4), (6). The reason for the distinction was that "[u]nlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." S. Rep. No. 95-382, p. 2 (1977).

As the Consumer Financial Protection Bureau has noted, the "advent and growth of debt buying is one of the most significant changes to the debt collection market" since Congress enacted the FDCPA in late 1970s.[1] Unlike traditional debt collectors, who were paid a portion of the debt collected on behalf of the debt originator, members of this new industry "purchase defaulted debt from original creditors" for pennies on the dollar and then "seek to collect on purchased debts themselves."[2]

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[1] Consumer Financial Protection Bureau, Fair Debt Collection Practices Act: CFPB Annual Report 2014 ("CFPB 2014 Annual Report"), at 7 (March 2014), *available at* http://files.consumerfinance.gov/f/201403_cfpb_fair-debt-collection-practices-act.pdf.

[2] *Id.*; *see also* Federal Trade Commission, The Structure and Practices of the Debt Buying Industry ("Debt Buying Industry"), at ii (January 2013) (on average, debt buyers pay

However, very much like other debt collectors, these purchasers of defaulted debt have powerful incentives to engage in aggressive collection practices and lack the countervailing incentives of ordinary creditors to maintain a good reputation with consumers.

The courts of appeals are deeply and avowedly divided over whether these purchasers of defaulted debt are covered by the FDCPA. This case presents the Court an opportunity to resolve that important conflict.

1. Petitioners obtained car loans from CitiFinancial Auto. When they were unable to make the payments and defaulted, CitiFinancial Auto repossessed their cars, sold the vehicles, and informed petitioners they owed a deficiency balance. Pet. App. 5a. It later sold the defaulted loans to respondent Santander Consumer USA, Inc. (Santander), which is in the business of purchasing defaulted debt for pennies on the dollar, then seeking to recover some or all of the debt from the defaulting debtor. *Id.*

On November 29, 2012, petitioners filed the present putative class action against respondents, alleging violations of the FDCPA. Among other things, petitioners alleged that Santander violated the statute by misrepresenting its authority to collect the debt and the amount of the debt allegedly owed, and by communicating directly with consumers it

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four cents per dollar of debt face value), *available at* https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

knew to be represented by counsel. *See* Pet. App. 5a, 23a; Complaint ¶ 10.[3]

Santander moved to dismiss, arguing that it did not qualify as a "debt collector" under the statutory definition because it had purchased the defaulted debt it was seeking to collect. Pet. App. 6a. The FDCPA provides that a defendant is a "debt collector" if it meets either of two definitions, subject to a number of exceptions. The term "debt collector," thus, is defined as:

> any person **[1]** who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or **[2]** who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . . The term does not include— . . .
>
> (F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . (iii) concerns a *debt which was not in default at the time it was obtained by such person* . . . .

15 U.S.C. § 1692a(6) (emphasis added).

The statute distinguishes debt collectors, so defined, from "creditors." Similar to the definition of "debt collector," the definition of "creditor" includes

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[3] The Complaint is included at pages 5-21 of the Joint Appendix filed with the Fourth Circuit.

an exception that depends on the default status of transferred debt:

> The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he *receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another*.

Id. § 1692a(4) (emphasis added).

Like many purchasers of defaulted debt, Santander, a consumer finance company, conducts a range of other business activities, precluding it from coverage under the first prong of the "debt collector" definition covering businesses whose "principal purpose . . . is the collection of any debts." 15 U.S.C. § 1692a(6). *See* Pet. App. 13a. Accordingly, the question was whether Santander met the second "regularly collects" prong of the definition or was, instead, a creditor.

Pointing to Section 1692a(6)(F)(iii), petitioners argued that "non-originating debt buyers (i.e. Santander) are subject to liability under the FDCPA where the debt acquired was in default." Pet. App. 29a. In contrast, Santander "argue[d] that it is a creditor exempt from liability under the FDCPA because it held the debt and collected the same on its own behalf." *Id.*

The district court agreed with Santander and dismissed. Petitioners appealed. Pet. App. 6a.

2. The Fourth Circuit affirmed, explaining that "[w]hile the FDCPA is a somewhat complex and technical regulation of debt collector practices, we

conclude that it generally does not regulate creditors when they collect debt on their own account and that, on the facts alleged by the plaintiffs, Santander became a creditor when it purchased the loans before engaging in the challenged practices." Pet. App. 4a-5a. In the course of doing so, the court expressly embraced the position of the Ninth and Eleventh Circuits, *id.* 18a, while recognizing that it was departing from the rule applied in the Third, Sixth, and Seventh Circuits, *id.* 12a.

The Fourth Circuit accepted that Santander satisfied the portion of the definition of "debt collector" encompassing a company that "regularly collects or attempts to collect, directly or indirectly, debts." 15 U.S.C. § 1692a(6). But it concluded that purchasers of defaulted debt are saved from regulation by the additional requirement that the debt be "owed or due *another*." *Id.* (emphasis added). The court assumed that Congress meant "owed or due another *at the time of collection*" rather than "owed or due another *at the time of origination*." *See* Pet. App. 17a-18a; *contra FTC v. Check Investors, Inc.*, 502 F.3d 159, 173 (3d Cir. 2007) ("Congress has unambiguously directed our focus to the time the debt was acquired in determining whether one is acting as a creditor or debt collector under the FDCPA."). On that understanding of the statute, the court concluded that Santander was not a debt collector because "the debts that Santander was collecting were owed to it, Santander, not to another." Pet. App. 13a.

The court did not dispute that this interpretation rendered one of the exceptions to the definition of "debt collector" surplusage. Specifically, Section

1692a(6)(F)(iii), provides that the term "debt collector" does "not include . . . any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." On the Fourth Circuit's view, that exemption would never come into play because someone who "obtained" a defaulted debt would not be attempting to collect a debt "owed or due another" but would rather be collecting a debt owed to itself. But the court sidestepped the problem by declaring that if "a person does not satisfy one of the definitions in the main text, the exclusions in subsections § 1692a(6)(A)-(F) do not come into play." *Id.* 11a; *see also id.* 14a-15a.

The court of appeals also made no effort to square its interpretation with the basic purposes of the statute, which is to "eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). It did not contest, for example, that Congress distinguished between creditors and debt collectors because it believed that creditors would be "restrained by the desire to protect their good will when collecting past due accounts," while debt collectors would be "likely to have no future contract with the consumer" and therefore "unconcerned with the consumer's opinion of them." S. Rep. No. 95-382, at 2. Nor did it doubt that the "purchaser of an already-defaulted debt – like a debt collector, and unlike the originator and servicer of a non-defaulted debt – has no ongoing relationship with the debtor and, therefore, no incentive to engender good will by treating the debtor with honesty and respect." *Ruth v. Triumph P'ships*, 577 F.3d 790, 797 (7th Cir. 2009).

3. Petitioner filed a petition for rehearing en banc, noting that the panel decision exacerbated a circuit conflict, but the petition was denied. Pet. App. 41a-42a.

REASONS FOR GRANTING THE WRIT

As the Fourth Circuit documented, the question whether the FDCPA applies to those who purchase defaulted debt is the subject of a deep, mature circuit conflict that has only become more entrenched with time. The question is of vital importance to both consumers and a burgeoning industry of defaulted debt purchasers whose legal responsibilities presently vary dramatically from circuit to circuit. And the Fourth Circuit's resolution of the statutory question is wrong, at odds with the text and purposes of the statute, while also in conflict with the reasonable interpretation of the federal agencies delegated responsibility for its enforcement. This case thus presents the Court an opportunity to resolve an intolerable circuit conflict and restore important protections to consumers throughout the country.

I. There Is A 5-3 Conflict Over Whether Collectors Of Purchased Defaulted Debt Are "Debt Collectors" Under The FDCPA.

As the Fourth Circuit's opinion documents, the circuits are deeply divided over the FDCPA's application to companies that purchase and collect defaulted debt. Four circuits and the District of Columbia Court of Appeals hold that such companies are debt collectors under the Act, while three other circuits have rejected that interpretation.

A. The Third, Fifth, Sixth, And Seventh Circuits, And The District of Columbia Court of Appeals, Hold That Collectors Of Purchased Defaulted Debt Are Debt Collectors Within The Meaning Of The FDCPA.

The decision below directly conflicts with longstanding precedent from the Third, Fifth, Sixth, and Seventh Circuits and the District of Columbia Court of Appeals.

1. ***Third Circuit.*** In *Federal Trade Commission v. Check Investors, Inc.*, 502 F.3d 159 (3d Cir. 2007), the defendant was in the business of purchasing debts arising from bounced consumer checks. *Id.* at 162. The founder of Check Investors had previously served time in prison for posing as an FBI agent in attempts to collect debts. *Id.* at 163. He started his new business on the assumption "that if a debt collection business collected only debts it actually owned based on purchasing [bounced] checks, it would not be subject to the FDCPA, and would therefore be free to use collection techniques prohibited by the FDCPA such as harassment and deception." *Id.*

Acting on that belief, the business's "primary *modus operandi* was to accuse consumers of being criminals or crooks, and threatening them with arrest and criminal or civil prosecution." *Id.* For example, one "consumer was told that if she did not pay, her children would 'watch their mother being taken away in handcuffs,' and they would 'be bringing their mommy care packages in prison.'" *Id.* These threats "were all false," but effective. *Id.* "In one case, Check Investors' repeatedly called a 64-year

old mother regarding her son's debt; fearing that her son would be arrested and carted off to jail, she paid the amount of the demand." *Id.* at 164. The demanded amount typically included "a fee of $125 or $130 [added] to the face amount of each check; an amount that exceeded the legal limit for such fees under the laws of most states." *Id.* at 163.

The Federal Trade Commission successfully brought suit, alleging violations of various provisions of the FCPA. On appeal, Check Investors argued, as respondent did below, that it was not a debt collector, but rather a creditor, because it was "collecting debts actually owed to them, as opposed to . . . collecting obligations owed to someone else." *Id* at 172. Relying in part on its prior decision in *Pollice v. National Tax Funding, L.P.*, 225 F.3d 379 (3d Cir. 2000), the Third Circuit affirmed.

The court began by noting that the statute was not entirely clear on this question. Ordinarily, the Act distinguishes between "debt collectors" who are covered by the statute and "creditors" who usually are not. *Check Investors*, 502 F.3d at 173. However, "for debts that do not originate with the one attempting collection, but are acquired from another, the collection activity related to that debt could logically fall into either category." *Id.* (quoting *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir. 2003)). Because one cannot be both a creditor and a debt collector for any given transaction, a line had to be drawn. To draw it, the court looked to statute's exception of those who collect debt "which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii). The court reasoned that there

would be no point in specifically excluding collectors of *un*defaulted debt from the definition of "debt collector" unless Congress contemplated that collecters of *defaulted* debt counted as debt collectors subject to the statute. 502 F.3d at 173.

The court acknowledged that at the time of collection, a company like Check Investors might be owed the debt and, therefore, could be seen as "at least nominally a creditor." *Id.* "Nevertheless, pursuant to § 1692a, Congress has unambiguously directed our focus to *the time the debt was acquired* in determining whether one is acting as a creditor or debt collector under the FDCPA." *Id.* (emphasis added).

The Third Circuit noted that this interpretation also best accorded with the statute's purpose and rationale. *Id.* at 173 (citing S. Rep. No. 95-382, at 2). The court observed that the purchaser of defaulted debt acted in the same manner, and with the same dangerous incentives, as a typical third-party debt collector rather than an ordinary creditor: "No merchant worried about goodwill or the future of his/her business would have engaged in the kind of conduct that was the daily fare of the collectors at Check Investors." *Id.*

2. ***Sixth Circuit***. In *Bridge v. Ocwen Federal Bank, FSB*, 681 F.3d 355 (6th Cir. 2012), the Sixth Circuit adopted the Third Circuit's interpretation, "hold[ing] that the definition of debt collector pursuant to § 1692a(6)(F)(iii) includes any non-originating debt holder that either acquired a debt in default or has treated the debt as if it were in default at the time of acquisition." *Id.* at 362.

The court agreed with the Third Circuit that "as to a specific debt, one cannot be both a 'creditor' and a 'debt collector,' as defined in the FDCPA, because those terms are mutually exclusive." *Id.* at 359 (quoting *Check Investors*, 502 F.3d at 173). And it agreed that the "distinction between a creditor and a debt collector lies precisely in the language of § 1692a(6)(F)(iii)." *Id.* On that understanding, for "an entity that did not originate the debt in question but acquired it and attempts to collect on it, that entity is either a creditor or a debt collector depending on the default status of the debt at the time it was acquired." *Id.*

3. ***Seventh Circuit.*** The Seventh Circuit applied the same rule in *Ruth v. Triumph Partnerships*, 577 F.3d 790 (7th Cir. 2009). As in this case, the defendant in *Ruth* was "a company that purchases defaulted debts and attempts to recover them." *Id.* at 793. And as in this case, the defendant argued that because it was collecting defaulted debt it had purchased, "the FDCPA does not apply to it." *Id.* at 796.

The Seventh Circuit rejected that claim. "Where, as here, the party seeking to collect a debt did not originate it but instead acquired it from another party, we have held that the party's status under the FDCPA turns on whether the debt was in default at the time it was acquired." *Id.* (citing *McKinney v. Cadleway Props., Inc.*, 548 F.3d 496, 501 (7th Cir. 2008); *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 538-39 (7th Cir. 2003)).

The court explained that this view of the text finds additional support "in the rationale behind Congress' decision to treat the originator of a debt

obligation differently from a party whose only interest is in the collection of a debt that already has fallen into default." *Id.* at 797. "The purchaser of an already-defaulted debt – like the debt collector, and unlike the originator and servicer of a non-defaulted debt – has no ongoing relationship with the debtor and, therefore, no incentive to engender good will by treating the debtor with honesty and respect." *Id.*

4. ***Fifth Circuit and District of Columbia Court of Appeals.*** The Fifth Circuit and the District of Columbia Court of Appeals have also construed the FDCPA to apply to "those entities whose interest in the debt was acquired when the debt was in default." *Logan v. LaSalle Bank Nat'l Ass'n*, 80 A.3d 1014, 1021 (D.C. 2013) (citing *Ruth*, 577 F.3d at 796-97; *Check Investors*, 502 F.3d at 172-73); *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985) ("[A] debt collector does not include . . . an assignee of a debt, *as long as the debt was not in default at the time it was assigned.*" (emphasis added)).

B. The Fourth, Ninth, And Eleventh Circuits Reject The Majority Rule.

The Fourth, Ninth, and Eleventh Circuits have reached the opposite conclusion.

1. ***Fourth Circuit.*** As discussed above, the Fourth Circuit in this case acknowledged the decisions of the Third, Sixth, and Seventh Circuits, but rejected their reasoning, concluding instead that "the default status of a debt has no bearing on whether a person qualifies as a debt collector under the threshold definition set forth in 15 U.S.C. § 1692a(6)." Pet. App. 8a. "That determination," the court believed, ordinarily turns instead "on whether a

person collects debt *on behalf of others* or *for its own account*." *Id.* (emphasis in original). Because "the debts that Santander was collecting were owed to it, Santander, not to another," respondent was excluded from the Act's coverage. *Id.* 13a-14a.

2. ***Ninth Circuit.*** The Ninth Circuit had previously reached the same conclusion based on similar reasoning in *Schlegel v. Wells Fargo Bank, NA*, 720 F.3d 1204 (9th Cir. 2013). In that case, Wells Fargo acquired a defaulted mortgage as part of a bankruptcy proceeding. *Id.* at 1206. Without acknowledging or engaging with the contrary views of other circuits, the Ninth Circuit held that because Wells Fargo had acquired the debt, it could not be a debt collector because it was not attempting to collect a debt owed to "another" within the meaning of the statutory definition of a "debt collector." *Id.* at 1209.

3. ***Eleventh Circuit.*** In *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309 (11th Cir. 2015), the Eleventh Circuit likewise was required to decide "whether a bank that collects or attempts to collect on a debt, which was in default at the time it was acquired by the bank, qualifies as a 'debt collector' under the" FDCPA. *Id.* at 1310. Like the Fourth Circuit below, the Eleventh Circuit rejected the claim that "the line between creditors and debt collectors is drawn by the default status of the debt." *Id.* at 1314. Instead, the court concluded that it needed to

> look no further than the statutory text to conclude that, under the plain language of the FDCPA, a bank (or any person or entity) does not qualify as a "debt collector" where the bank does not regularly collect or

> attempt to collect on debts "owed or due another" . . . even where the consumer's debt was in default at the time the bank acquired it.

Id. at 1311; *see also id.* at 1316 ("[W]e reject Davidson's argument that a non-originating debt holder is a 'debt collector' for purposes of the FDCPA solely because the debt was in default at the time it was acquired.").[4]

The Federal Trade Commission filed an amicus brief supporting rehearing en banc in *Davidson*, arguing that the question decided by the panel "is exceptionally important, and the panel incorrectly decided it in conflict with the decisions of four other courts of appeals." Amicus Brief of the Federal Trade Commission Supporting Rehearing En Banc, *Davidson*, *supra*, at 5 (hereinafter "FTC *Davidson* Br.").[5] However, the Eleventh Circuit denied the petition.

C. Only This Court Can Resolve The Circuit Conflict.

There is no genuine prospect that the circuit split will resolve itself without this Court's intervention.

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[4] The Eleventh Circuit held open that purchasers of defaulted debt could fall under the first prong of the statutory definition of a "debt collector," if its "principal purpose" is the collection of debts. *Id.* at 1316 n.8. But it did not dispute that even if this were so, it would exclude a great many companies (like the defendant before it and respondent here) that regularly collect defaulted debt as a significant – but not "principal" – portion of their business.

[5] *Available at* 2015 WL 5608572.

The Fourth Circuit issued its decision fully aware of the contrary authority in other circuits, *see* Pet. App. 12a, and denied a rehearing petition premised on the circuit conflict. The Eleventh Circuit likewise persisted in its position despite the Federal Trade Commission's amicus brief in support of rehearing, which pointed out the circuit conflict and the importance of the question. At the same time, the Government's support for the majority position makes it unlikely all five of the courts on the other side of the divide will go en banc and reverse course.

Finally, because courts on both sides of the conflict believe their conclusions are compelled by the statute, there is no prospect that a federal agency could resolve the dispute by issuing regulations. *Compare Check Investors*, 502 F.3d at 173 ("Congress has *unambiguously* directed our focus to the time the debt was acquired in determining whether one is acting as a creditor or debt collector under the FDCPA." (emphasis added)), *with Davidson*, 797 F.3d at 1316 ("The statute is *not susceptible* to [that] interpretation. Instead, applying the *plain language* of the statute, we find that a person who does not otherwise meet the requirements of § 1692a(6) is not a 'debt collector' under the FDCPA, even where the consumer's debt was in default at the time the person acquired it." (emphasis added)).

II. The FDCPA's Application To Purchasers Of Defaulted Debt Is A Question Of Substantial Importance.

The Federal Trade Commission had ample grounds for telling the Eleventh Circuit that the question presented in that case (and now by this petition) is exceptionally important. *See* FTC

Davidson Br. 5. The Fourth Circuit's decision "will remove important protections for consumers in the states of [that] Circuit and may hamper both government and private efforts to combat abusive debt-collection practices." *Id.* 1-2. At the same time, the current circuit split disserves the growing debt buying industry, which finds itself subject to dramatically different federal requirements across a hodge-podge of states.

1. Congress enacted the FDPCA because it recognized the importance of protecting consumers from the documents abuses of the debt collection industry. 15 U.S.C. § 1692(a). Those practices, Congress determined, impose significant harm on their victims, contributing to "the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." *Id.*

In the decades since the FDCPA was passed, Government enforcement efforts have documented that the abuses that gave rise to the statute continue to afflict many consumers. In 2016 alone, the debt collection industry was the subject of more than 85,000 complaints to federal consumer protection agencies, more than any other industry.[6] At the same time, federal enforcement actions resulted in

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[6] *See* Consumer Financial Protection Bureau, Fair Debt Collection Practices Act: CFPB Annual Report 2016 ("CFPB 2016 Annual Report"), at 18 (March 2016), *available at* http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf.

over $360 million in relief to consumers and $79 million in civil penalties.[7]

Whether the FDCPA provides a remedy for such abuses when perpetrated by debt buyers is a question of critical importance to consumers and government enforcement agencies. The FTC has called the advent and growth of debt buying "the most significant change in the debt collection business in the past decade." Federal Trade Commission, Collecting Consumer Debts: The Challenges of Change – A Workshop Report ("The Challenges of Change"), at iv (February 2009).[8] Debt buying was rare at the time the FDCPA was enacted. *See* Debt Buying Industry, *supra*, at 12 ("The practice of creditors selling consumer debts on a large scale has its origins in the savings and loan crisis of the late 1980s and early 1990s."). It now constitutes a multi-billion dollar industry with "hundreds, if not thousands, of entities of varying sizes that purchase debts." *Id.* at 14.

As the cases in the circuit split demonstrate, the risk of abusive collection practices is not eliminated when a debt collector purchases the defaulted debt it is seeking to collect. Indeed, the Federal Government has asserted FDCPA claims against numerous debt buyers, alleging serious misconduct. For example, in 2004, the Government settled claims against one debt buyer it alleged had "threatened and harassed

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[7] *Id.* at 27.

[8] *Available at* https://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf.

thousands of consumers to get them to pay old, unenforceable debts or debts they did not owe," "[u]sing obscene or profane language," "[c]alling consumers continuously with the intention of annoying and abusing them," "misrepresenting themselves as attorneys," and "[t]hreatening imprisonment, seizure, garnishment, attachment or sale of property or wages with full knowledge that such action could not legally be taken."[9] Even after the settlement, the debt buyer continued to engage in illegal misconduct, requiring further enforcement action.[10]

More recently, the Government filed FDCPA claims against the country's two largest debt buyers, alleging, among other things, that "[w]ithout verifying the debt, the companies collected payments by pressuring consumers with false statements and churning out lawsuits using robo-signed court documents," including lawsuits that they knew or should have known were barred by the statute of limitations.[11] Similar abuses have been documented elsewhere.[12]

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[9] *See* Release, FTC, Debt Buyer/Debt Collection Companies and Their Principals Settle FTC Charges (Mar. 24, 2004), *available at* https://www.ftc.gov/news-events/press-releases/2004/03/debt-buyerdebt-collection-companies-and-their-principals-settle.

[10] *See* Release, FTC, Debt Collector Settles with FTC for Abusive Practices (Mar. 12, 2007), *available at* https://www.ftc.gov/news-events/press-releases/2007/03/debt-collector-settles-ftc-abusive-practices.

[11] *See* Release, CFPB, CFPB Takes Action Against the Two Largest Debt Buyers for Using Deceptive Tactics to Collect Bad

The Government has also found that the debt buying process may itself contribute to violations of consumer's rights as important information (*e.g.*, regarding the amount and validity of a debt) may be lost as a debt is sold from one entity to another.[13]

2. Resolution of the question presented is also important for debt buyers. In those circuits exempting debt buyers from FDCPA coverage, companies that engage in ethical collection practices are put at precisely the competitive disadvantage Congress intended the FDCPA to eliminate. *See* 15 U.S.C. § 1692(e).

At the same time, the many debt buyers operating in multiple circuits are subject to varying legal requirements. Increasingly, the debt buying market has come to be dominated by large national firms operating in many states. Debt Buying Industry, *supra*, at 7 (finding that nine of the largest debt buyers "collectively purchased 76.1% of all consumer debt sold in 2008"). Presently, the same buyer may be subject to radically different obligations

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Debts, *available at* http://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-the-two-largest-debt-buyers-for-using-deceptive-tactics-to-collect-bad-debts.

[12] *See, e.g.*, Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M. L. REV. 327 (2014); Rick Jurgens & Robert J. Hobbs, Nat'l Consumer Law Ctr., The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts, at 18 (July 2010), *available at* https://www.nclc.org/images/pdf/debt_collection/debt-machine.pdf.

[13] *See* CFPB 2016 Annual Report, *supra*, at 10-11.

depending on whether a debtor is living in Atlanta or Knoxville, Philadelphia or Richmond.

The existing circuit conflict also creates an incentive for forum shopping. While consumers presumably prefer to litigate FDCPA cases in their home districts, they always have the right to sue a corporate defendant in its state of incorporation or principal place of business, *see Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014), which may be in a circuit with different law on the question presented.

III. The Fourth Circuit's Decision Is Wrong.

Certiorari is further warranted because the decision below is wrong.

A. The Decision Below Conflicts With The Text, Structure, And Purposes Of The FDCPA.

1. The Fourth Circuit believed that the text of the statute unambiguously excludes purchasers of defaulted debt from FDCPA responsibilities by defining "debt collectors" to include only those who attempt to collect debts "owed or due *another*." 15 U.S.C. § 1692a(6) (emphasis added); *see, e.g.*, Pet. App. 8a, 10a, 11a. Because debt buyers attempt to collect debts owed to themselves, it reasoned, they are not attempting to collect a debt due "another." Pet. App. 10a.

The unspoken premise of this reasoning is that a debt originated by a creditor becomes "due another" within the meaning of the statute upon assignment to a third party debt buyer. But that is far from obvious. To be sure, the assignee becomes entitled to demand that the payment owed the originator be tendered to the assignee. *See* RESTATEMENT

(SECOND) OF CONTRACTS § 317(1). But in common parlance, it is easy enough to say that the debt is owed to the originator, with the assignee simply entitled to collect it. *See id.* chp. 15 introductory note (explaining that assignments were originally conceived as a form of "power of attorney enabling the assignee to sue in the assignor's name"). Or put another way, the statute's reference to a debt "due another" simply does not say whether the debt must be "due another *at the time of collection*" or "due another *at the time of origination.*"

If there was nothing in the statute beyond the reference to a debt "due another," the Fourth Circuit's resolution of that ambiguity might be plausible. But there *is* more to the statute, and that additional language cuts decisively against the court of appeal's interpretation. In the very same definitional paragraph Congress stated that the term "debt collector" does *not* include "any person collecting or attempting to collect any debt . . . owed or due another to the extent such activity . . . concerns a debt which was *not in default at the time it was obtained* by such person." 15 U.S.C. § 1692a(6)(F)(iii) (emphasis added).

The subsection (F)(iii) exception demonstrates that Congress did *not* intend that the main definition's reference to debt "due another" automatically exclude any defendant collecting an assigned debt – if that were so, the exception in subsection (F)(iii) would be superfluous. That is, all of the entities described in subsection (F)(iii) have "obtained" the debt they are attempting to collect. As a result, on the Fourth Circuit's interpretation, none is attempting to collect a debt that is "due another"

within the meaning of the main definition. And if that is right, an entity attempting to collect a debt that "was not in default at the time it was obtained" has no need of the subsection (F)(iii) exception – it was never in danger of being considered a debt collector in the first place.

At the same time, the Fourth Circuit's interpretation does violence to subsection (F)(iii)'s necessary implication that assignees of defaulted debt are otherwise included as "debt collectors" under the provision's main definition.

Both problems are avoided by the interpretation adopted by the majority of circuits, which understand the main definitions' reference to a debt "due another" to refer to debts due another at the time of origination, not the time of collection. So understood, the main definition captures debt buyers and other assignees, but the subsection (F)(iii) exception then eliminates assignees who obtain the debt before it falls into default, as is typical of debt servicing companies, whom Congress intended to leave unregulated by the Act. *See* S. Rep. No. 95-382, at 3-4.

2. This harmonization of the various parts of the "debt collector" definition best aligns with the statute's overall structure and basic rationale.

For one thing, the definition of a "creditor" contains an exception roughly parallel to the subsection (F)(iii) exception to the definition of a "debt collector." *See* 15 U.S.C. § 1692a(4). That creditor exception again turns on whether the collector acquired the debt before or after it went into default. *See id.* As construed by the majority of courts, these definitions and their exceptions work in

tandem – one who collects a debt obtained before it went into default is a creditor, not a debt collector; one who obtains the debt after default is a debt collector, not a creditor.

Drawing this distinction is also "reasonable in light of the conduct regulated by the statute." *Schlosser*, 323 F.3d at 538. "If the one who acquired the debt continues to service it, it is acting much like the original creditor that created the debt. On the other hand, if it simply acquires the debt for collection, it is acting more like a debt collector." *Id.* at 536. A purchaser of defaulted debt has the same incentives for aggressive collection as any other third party debt collector, while similarly lacking the countervailing market pressures to maintain the goodwill of debtors. There is no reason for Congress to treat them differently and nothing in the text of the statute that requires courts to overlook this important reality.

B. The Decision Below Conflicts With The Considered View Of The Agencies Congress Tasked With Enforcing The FDCPA.

Finally, the decision below warrants review because it conflicts with the longstanding interpretation of the agencies Congress assigned principal responsibility for enforcing the FDCPA.

As originally enacted, the FDCPA authorized the Federal Trade Commission to "enforce compliance with" the Act, using its powers under the Federal Trade Commission Act. *See* 15 U.S.C. § 1692*l*(a). As part of the Consumer Financial Protection Act of 2010, the Consumer Financial Protection Bureau was also given overlapping enforcement authority with

respect to non-bank financial institutions. *See id.* § 1692*l*(b)(6).

These two agencies and the Solicitor General have consistently construed the FDCPA to apply to purchasers of defaulted debt. For example, defending the Federal Trade Commission's victory in *Check Investors* in 2008, the Solicitor General took the position in this Court that the "statutory distinction between a 'creditor' and a 'debt collector' depends, in the case of a third party to whom a debt has been transferred or assigned, solely upon whether the debt in question was in default at the time of the transfer or assignment." U.S. BIO 12, *Check Investors, Inc. v. FTC*, No. 08-37. [14] And as noted above, the Commission filed an amicus brief urging rehearing of the Eleventh Circuit's contrary decision in *Davidson*, stating that a "company that regularly buys debts owed to others and collects them is a 'debt collector' under the FDCPA for debts that were in default at the time it acquired those debts, even though, in acquiring them outright, the company was collecting them on its own behalf rather than 'for' another entity with a continuing ownership interest in them." FTC *Davidson* Br. 9. The Commission has also expressed its interpretation in other official documents and publications.[15] More recently, the

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[14] *Available at* 2008 WL 4533650. The petition in *Check Investors* was filed prior to the emergence of the circuit conflict. *See id.* at 12.

[15] *See, e.g.*, The Challenges of Change, *supra*, at 5; Federal Trade Commission, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration, at 6

Consumer Finance Protection Bureau has embraced the same interpretation in publications, enforcement actions, and reports to Congress. [16]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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n.15 (July 2010), *available at* www.ftc.gov/os/2010/07/debtcollectionreport.pdf.

[16] *See, e.g.*, CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts, *available at* http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf; CFPB 2016 Annual Report, *supra*, at 33-34 (discussing enforcement actions in report to Congress).

APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1187

RICKY HENSON; IAN MATTHEW GLOVER; KAREN PACOULOUTE, f/k/a Karen Welcome Kuteyi; PAULETTE HOUSE,
Plaintiffs - Appellants,

v.

SANTANDER CONSUMER USA, INC.,
Defendant - Appellee,

and

COMMERCIAL RECOVERY SYSTEMS, INC.; NCB MANAGEMENT SERVICES, INCORPORATED,
Defendants.

AARP; NATIONAL CONSUMER LAW CENTER; NATIONAL ASSOCIATION OF CONSUMER ADVOCATES; CIVIL JUSTICE, INC.; PUBLIC JUSTICE CENTER, INC.; MARYLAND

CONSUMER RIGHTS COALITION, INC.; ATTORNEY GENERAL OF MARYLAND,

Amici Supporting Appellants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Richard D. Bennett, District Judge. (1:12-cv-03519-RDB)

Argued: December 9, 2015 Decided: March 23, 2016

Before NIEMEYER, DUNCAN, and AGEE, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Duncan and Judge Agee joined.

ARGUED: Cory Lev Zajdel, Z LAW, LLC, Reisterstown, Maryland, for Appellants. Kim M. Watterson, REED SMITH LLP, Pittsburgh, Pennsylvania, for Appellee. **ON BRIEF:** Travis Sabalewski, Robert Luck Jr., Richmond, Virginia, Richard L. Heppner, REED SMITH LLP, Pittsburgh, Pennsylvania, for Appellee. Julie Nepveu, AARP FOUNDATION LITIGATION, Washington, D.C., for Amicus AARP. Joseph S. Mack, Catherine Gonzalez, CIVIL JUSTICE, INC., Baltimore, Maryland; Brian

E. Frosh, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Amici Attorney General of Maryland, Civil Justice, Inc., Maryland Consumer Rights Coalition, Inc., National Association of Consumer Advocates, National Consumer Law Center and Public Justice Center, Inc.

NIEMEYER, Circuit Judge:

Four Maryland consumers commenced this action against Santander Consumer USA, Inc., and its agents, alleging that the defendants violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692-1692p, by engaging in prohibited collection practices when collecting on the plaintiffs' automobile loans. The loans were originally made by CitiFinancial Auto, and, after the plaintiffs were unable to make payments, CitiFinancial Auto foreclosed on the loans, leaving the plaintiffs obligated to pay deficiencies. CitiFinancial Auto then sold the defaulted loans to Santander as part of an investment bundle of receivables, and Santander thereafter attempted to collect on the loans it had purchased.

The district court granted Santander's motion to dismiss the claims against it under Federal Rule of Civil Procedure 12(b)(6) on the ground that the complaint did not allege facts showing that Santander qualified as a "debt collector" subject to the FDCPA. The court concluded that the complaint demonstrated that Santander was a consumer finance company that was collecting debts *on its own behalf* as a creditor and that the FDCPA generally does not regulate creditors collecting on debt owed to themselves.

We affirm. While the FDCPA is a somewhat complex and technical regulation of debt collector practices, we conclude that it generally does not regulate creditors when they collect debt on their own account and that, on the facts alleged by the plaintiffs, Santander became a creditor when it

purchased the loans before engaging in the challenged practices.

I

Ricky Henson, Ian Glover, Karen Pacouloute, and Paulette House, Maryland consumers who are the plaintiffs in this action, each signed a retail installment sales contract with CitiFinancial Auto Credit, Inc., CitiFinancial Auto Corp., or CitiFinancial Auto, LTD (collectively, "CitiFinancial Auto") to finance the purchase of an automobile. When the plaintiffs were unable to make the payments required by the contracts and thereby defaulted, CitiFinancial Auto repossessed and sold their vehicles and subsequently informed each plaintiff that he or she owed a deficiency balance.

On December 1, 2011, CitiFinancial Auto sold $3.55 billion in loan receivables, including the plaintiffs' defaulted loans, to Santander, a consumer finance company. The plaintiffs allege that, as part of its business, Santander "acquires defaulted consumer debt . . . for a few cents on the dollar."

Thereafter, Santander and its agents, presumably in an effort to collect more than the few cents on the dollar that it paid for defaulted loans, "began communicating with [the plaintiffs] . . . in an attempt to collect on the alleged debts." And during the course of those communications, Santander and its agents allegedly misrepresented the amount of the debt and their entitlement to collect it.

The plaintiffs commenced this action in November 2012 against Santander and its agents, alleging that they violated the FDCPA in pursuing the debts and in the manner they pursued them. In

their complaint, they proposed to represent a class of certain debtors "who were subjected to debt collection efforts by Santander Consumer USA, Inc. on or after December 1, 2011," the date on which Santander purchased the receivables from CitiFinancial Auto.

Santander filed a motion to dismiss the complaint against it under Federal Rule of Civil Procedure 12(b)(6) on the ground that the complaint's allegations did not demonstrate that Santander qualified as a "debt collector," as necessary to trigger liability under the FDCPA, and the district court granted the motion by order dated May 6, 2014. In its supporting opinion, the court noted that the FDCPA applies to "debt collectors," as that term is defined in the Act, but not to "creditors collecting debts in their own names and whose primary business is not debt collection." In reaching its conclusion, the court rejected the plaintiffs' argument that, because the plaintiffs' loans were in default when Santander acquired them from CitiFinancial Auto, Santander qualified as a debt collector under the FDCPA, rather than as a creditor.

The plaintiffs filed this appeal, presenting the single issue of whether, as necessary to state an FDCPA claim, their complaint adequately alleged that Santander was acting as a "debt collector," as that term is defined in 15 U.S.C. § 1692a(6), when it engaged in the collection practices challenged in the suit.

II

In their brief on appeal, the plaintiffs state their position that Santander was a "debt collector,"

subject to regulation by the FDCPA, based on the following reasoning:

> The terms "debt collector" and "creditor" are mutually exclusive under the FDCPA. An entity can be either a "debt collector" or a "creditor" in any particular transaction. The determining factor of whether an entity is a "debt collector" or "creditor" in any particular transaction when the entity in question is not the originating lender is *whether the debt was acquired prior to default or after default*. Since Santander acquired [the plaintiffs'] debts from the original lender well after each [plaintiff] defaulted on their debt, Santander's collection activities on these defaulted debts make[] it a "debt collector."

(Emphasis added). To make their argument, the plaintiffs rely on their interpretations of 15 U.S.C. §§ 1692a(4) and 1692a(6), which define "creditor" and "debt collector," respectively. Their argument rests on the premise that the FDCPA regulates debt collectors, not creditors, and that the two terms, as used in the Act, are mutually exclusive. *See Bridge v. Ocwen Fed. Bank, FSB*, 681 F.3d 355, 359 (6th Cir. 2012); *FTC v. Check Investors, Inc.*, 502 F.3d 159, 173 (3d Cir. 2007). Thus, they reason, because § 1692a(4) excludes from the definition of *creditor* "any person to the extent that he receives an assignment or transfer of *a debt in default* solely for the purpose of facilitating collection of such debt for another," such person must of logical necessity be a *debt collector*. Because Santander fits, as they argue, the exclusion from the definition of "creditor," it must therefore be

a "debt collector." They claim that this conclusion is fortified by one of the exclusions to the definition of "debt collector." *See* 15 U.S.C. § 1692a(6)(F)(iii) (excluding from the definition of debt collector "any person collecting or attempting to collect any debt . . . owed or due another to the extent such activity . . . concerns a debt which was not *in default* at the time it was obtained" (emphasis added). At bottom, they maintain that *the default status of debt* determines whether a purchaser of debt, such as Santander, is a debt collector or a creditor.

The plaintiffs' argument, however, contains several interpretational and logical flaws, such that their interpretation of the FDCPA ultimately stands in tension with its plain language. When arguing from the definition of *creditor*, they overlook the fact that the exclusion applies only to a person who receives defaulted debt "solely for the purpose of facilitating collection . . . *for another*." 15 U.S.C. § 1692a(4) (emphasis added). Similarly, in relying on the exclusion in § 1692a(6)(F)(iii), they fail to address whether Santander fits under any definition of "debt collector" before addressing whether the (F)(iii) exclusion applies.

We conclude that the default status of a debt has no bearing on whether a person qualifies as a debt collector under the threshold definition set forth in 15 U.S.C. § 1692a(6). That determination is ordinarily based on whether a person collects debt *on behalf of others* or *for its own account*, the main exception being when the "principal purpose" of the person's business is to collect debt.

We begin our explanation by noting at a general level that the FDCPA purports to regulate only the conduct of debt collectors, not creditors, generally distinguishing between the two based on whether the person acts in an agency relationship with the person to whom the borrower is indebted. With limited exceptions, a debt collector thus collects debt on behalf of a creditor. A creditor, on the other hand, is a person to whom the debt is owed, and when a creditor collects its debt for its own account, it is not generally acting as a debt collector.

The FDCPA's definitions of debt collector and creditor bear out this distinction.

The definition of debt collector, which is contained in § 1692a(6), is comprised of two parts. The first part defines the classes of persons that are *included* within the term "debt collector," while the second part defines those classes of persons that are *excluded* from the definition of debt collector. The first part, defining those who are included, provides in relevant part:

> The term "debt collector" means any person [1] who uses any instrumentality of interstate commerce or the mails in any business *the principal purpose of which is the collection of any debts*, or [2] who *regularly collects* or attempts to collect, directly or indirectly, *debts owed or due or asserted to be owed or due another*. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor [3] who, in the process of collecting his own debts, *uses any name other than his*

> *own* which would indicate that a third person is collecting or attempting to collect such debts.

15 U.S.C. § 1692a(6) (emphasis added). Stated more simply, this provision defines a debt collector as (1) a person whose *principal purpose* is to collect debts; (2) a person who *regularly* collects debts *owed to another*; or (3) a person who collects *its own debts*, using *a name other than its own* as if it were a debt collector.

The second part of § 1692a(6) defines the classes of persons that are excluded from the definition of debt collector, so that a person who meets one of the definitions of debt collector contained in the first part of § 1692a(6) will not qualify as such if it falls within one of the exclusions. As relevant here, exclusion (F)(iii) provides that "[t]he term [debt collector] does not include . . . any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii). To simplify, this exclusion means that a person collecting nondefaulted debts on behalf of others is not a debt collector. This exclusion was intended by Congress to protect those entities that function as loan servicers for debt not in default. *See* S. Rep. No. 95-382, at 3-4 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1698 ("[T]he committee does not intend the definition [of debt collector] to cover the activities of . . . *mortgage service companies and others who service outstanding debts for others*, so long as the debts were not in default when taken for servicing" (emphasis added)).

Thus, the overall structure of § 1692a(6) makes clear that when assessing whether a person qualifies as a "debt collector," we must first determine whether the person satisfies one of the statutory definitions given in the main text of § 1692a(6) before considering whether that person falls into one of the exclusions contained in subsections § 1692a(6)(A)-(F). If a person does not satisfy one of the definitions in the main text, the exclusions in subsections § 1692a(6)(A)-(F) do not come into play. *See Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1314 (11th Cir. 2015) ("[W]here a person does not fall within subsection (F) or any one of the six statutory exclusions, he is not deemed a 'debt collector' as a matter of course. [Instead], . . . he must satisfy the Act's substantive requirements").

The material distinction between a debt collector and a creditor -- at least with respect to the second definition of "debt collector" provided by § 1692a(6) -- is therefore whether a person's regular collection activity is only *for itself* (a creditor) or whether it regularly collects *for others* (a debt collector) -- not, as the plaintiffs urge, whether the debt was in default when the person acquired it. *See Heintz v. Jenkins*, 514 U.S. 291, 293 (1995) ("The Act's definition of the term 'debt collector' includes a person 'who regularly collects or attempts to collect, directly or indirectly, debts owed [to] . . . another'" (alteration in original) (quoting § 1692a(6))); *see also Davidson*, 797 F.3d at 1315-16 ("The statutory text is entirely transparent. . . . [A] person must regularly collect or attempt to collect debts *for others* in order to qualify as a 'debt collector' under the second definition of the term"); S.

Rep. No. 95-382, at 3 ("The Committee intends the term 'debt collector,' subject to the exclusions discussed below, to cover all *third persons* who regularly collect debts *for others*" (emphasis added)). *But see Bridge*, 681 F.3d at 359; *Ruth v. Triumph P'ships*, 577 F.3d 790, 796-97 (7th Cir. 2009); *Check Investors*, 502 F.3d at 173.

With this interpretation of § 1692a(6), we turn to the complaint in this case to assess what it states about Santander. The complaint alleges that the plaintiffs borrowed money from CitiFinancial Auto to purchase automobiles and that, when the plaintiffs went into default on the loans, CitiFinancial Auto repossessed and sold their automobiles, leaving them owing deficiency balances. It also alleges that when the loans were in default but *before* December 1, 2011, Santander was "hired . . . as a servicer to collect" on the loans, presumably on behalf of CitiFinancial Auto.

But the very next paragraph of the complaint alleges that on December 1, 2011, CitiFinancial Auto sold the plaintiffs' loans to Santander. *Only thereafter*, when Santander began collecting from the plaintiffs on the loans that it had purchased, did Santander engage in the conduct that the plaintiffs allege was in violation of the FDCPA. Specifically, the complaint alleges that after December 1, 2011, Santander improperly contacted the borrowers directly, misrepresented the amounts owed, and misrepresented the fact that Santander was entitled to collect on the loans. Importantly, however, the complaint does *not* allege that, when Santander engaged in the allegedly illegal collection practices, it

was collecting the debts *on behalf of CitiFinancial Auto*. Rather, it alleges that CitiFinancial Auto had *sold* the loans to Santander, presumably "for a few cents on the dollar," thus leaving Santander to collect on the debts for its own account. And this allegation is consistent with public SEC filings, which reveal that Santander purchased $3.55 billion in loan receivables from CitiFinancial Auto on December 1, 2011, following which Santander presumably attempted to obtain a return by collecting more than a few cents on the dollar through its collection efforts.

Applying these allegations to the definition of debt collector in § 1692a(6), it is apparent that Santander does not fall within the first or third definitions of debt collector. The complaint does not allege, nor do the plaintiffs argue, that Santander's *principal business* was to collect debt, alleging instead that Santander was a consumer finance company. The complaint also does not allege, nor do the plaintiffs contend, that Santander was using a name other than its own in collecting the debts. Thus, to allege that Santander was a debt collector, the complaint is left to satisfy the second definition of debt collector -- that Santander regularly collects debts owed to others and was doing so here.

Yet, the complaint's allegations also do not satisfy this definition because the debts that Santander was collecting were owed to it, Santander, not to another. This is alleged specifically and unambiguously. The complaint asserts that *after* Santander purchased the plaintiffs' debts on December 1, 2011 (and became the entity to which the debts were owed), it engaged in collection efforts

that violated the FDCPA. Thus, those collection efforts were pursued *for its own account*, as the loans were then owed to it. Santander was therefore not a person collecting a debt *on behalf of another*, so as to qualify as a debt collector under the second definition, but *on behalf of itself*, making it a creditor.

Because the complaint does not satisfy any definition of debt collector, the analysis ends, and the exclusions from the definition of debt collector, on which the plaintiffs rely, have no significance.

Nonetheless, the plaintiffs argue that the *default status* of a debt is determinative of whether a person who purchased the debt is a debt collector, pointing to exclusion (F)(iii), which *excludes* from the class of persons defined as a debt collector "any person collecting or attempting to collect any debt owed or due . . . another to the extent such activity . . . concerns a debt which was *not in default* at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii) (emphasis added). They argue that because that provision excludes persons collecting debts not in default, the definition of debt collector must, by a negative pregnant, necessarily include persons collecting defaulted debts that they did not originate. This logic, however, turns the statutory provision upside down, failing to recognize that the FDCPA defines debt collector by reference to those who are included in the various classes and then excludes, among others, the subset of persons who obtain nondefaulted debt to collect on it for others. As noted earlier, this exclusion was included by Congress to protect mortgage service companies and similar loan servicers who acquire debt not in default

and service it for a fee. The exclusion thus does not define "debt collector," but rather identifies a class of persons *excluded* from the definition of "debt collector."

In a similar vein, the plaintiffs argue that the definition of *creditor* supports their position that *the default status* of a debt defines whether a person attempting to collect that debt is a debt collector. In making this argument, they rely on the exclusion to the definition of creditor but, in doing so, the plaintiffs again apply the same kind of upside-down logic that relies on an inaccurate premise and a *negative pregnant that does not follow.*

The term "creditor" is defined by the FDCPA as "any person who offers or extends credit creating a debt or to whom a debt is owed." 15 U.S.C. § 1692a(4). The definition then excludes "any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." *Id. The plaintiffs argue that Santander fits the creditor* exclusion and therefore must necessarily be a debt collector.

The logic does not follow, mainly because debt collector is defined separately and that definition, rather than some implied definition, is determinative. But the logic is flawed even more fundamentally because the premise that Santander *satisfies the exclusion is incorrect. In arguing that* Santander satisfies the exclusion, the plaintiffs *recharacterize* the facts they alleged in the complaint, stating in their brief that, "although Santander currently owns [the plaintiffs'] debts, those debts

were assigned to Santander after default and *solely for the purpose of facilitating collection of the debts for CitiFinancial [Auto].*" (Emphasis added). But the facts that the plaintiffs presume in their brief are not the facts of their complaint. The complaint alleges that CitiFinancial Auto *sold* the loans to Santander and that Santander thereafter attempted to collect on them *for its own account*. Santander was, at the time of its allegedly illegal collection conduct, the plaintiffs' creditor, and nothing in the complaint suggests that it was acting on behalf of CitiFinancial Auto. The complaint does allege that *before* CitiFinancial Auto sold the loans to Santander, CitiFinancial Auto had "hired" Santander as a servicer to collect the plaintiffs' defaulted debt. But any conduct that Santander might have carried out as a debt servicer on CitiFinancial Auto's behalf was carried out *before* the debts were *sold* to Santander and *before* Santander engaged in the allegedly illegal collection conduct.

Apart from their argument based on the default status of debt, the plaintiffs also seek to avoid the interpretation of "debt collector" that we make, arguing that the second definition of debt collector in § 1692a(6) includes two separate classes of persons, one of which regularly collects "debts owed or due" and the other of which regularly collects "debts . . . asserted to be owed or due *another*." They argue that Santander fits into the first class of persons, even if it does not fit into the second, because the word "another" applies only to the second. To make this argument, however, the plaintiffs break in two the singular statutory phrase in § 1692a(6), which

defines debt collector as including any person who "regularly collects or attempts to collect . . . *debts owed or due or asserted to be owed or due another*," 15 U.S.C. § 1692a(6) (emphasis added), arguing that the term "another" modifies only the portion of the last phrase, "asserted to be owed or due another." We do not agree. While Congress did break up the definition of debt collector in § 1692a(6), defining several distinct classes of persons who qualify as a debt collector, it did not divide the "regularly collects" phrase. *As the phrase is written*, the word "another" modifies both "owed or due" and "asserted to be owed or due," so that the phrase defines a debt collector as including a person who collects debt due another *or* asserted to be due another. *Cf. Paroline v. United States*, 134 S. Ct. 1710, 1721 (2014) ("When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all" (quoting *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920))).

In another attempt to avoid our interpretation, the plaintiffs argue that "debts owed or due another" could refer to debts that were due another either when they were first *incurred* or at the time of the *collection activity*. Thus, according to the plaintiffs, when Santander collected on the debts that it had purchased, it could be seen as having acted to collect the debts of *another* because the loans were originally due to CitiFinancial Auto. This argument, however, is no more persuasive. Insofar as Congress was regulating debt-collector conduct, defining the term

"debt collector" to include a person who regularly collects debts owed to another, it had to be referring to debts as they existed *at the time of the conduct* that is subject to regulation. *See Davidson*, 797 F.3d at 1318 ("[O]ur inquiry under § 1692a(6) is not whether Capital One regularly collects on debts *originally* owed or due another and now owed to Capital One; our inquiry is whether Capital One regularly collects on debts owed or due another at the time of collection"); *see also Schlegel v. Wells Fargo Bank, NA*, 720 F.3d 1204, 1209 (9th Cir. 2013) ("The statute is not susceptible to the [plaintiffs'] interpretation that 'owed or due another' means 'originally owed or due another'").

Finally, the plaintiffs argue that because Santander had, before December 1, 2011, been a debt collector with respect to their loans, it remained a debt collector after it purchased their loans and thereafter collected on them. They suggest that Santander's *status* as a debt collector, generally, made it subject to regulation. As they summarize:

> In order for this Court to hold that Santander is not a "debt collector" with respect to [plaintiffs'] defaulted debts, this Court would have to create a loophole in the FDCPA that allows an entity acting as a "debt collector" while servicing . . . defaulted debts to become a "creditor" simply by purchasing the defaulted debt it was collecting for another.

Again, we reject this argument. Under the plaintiffs' interpretation, a company such as Santander -- which, as a consumer finance company, lends money, services loans, collects debt for itself, collects debt for

others, and otherwise engages in borrowing and investing its capital -- would be subject to the FDCPA for *all* of its collection activities simply because one of its several activities involves the collection of debts for others. Congress did not intend this. Rather, it aimed at *abusive conduct by persons who were acting as debt collectors*. *See* 15 U.S.C. § 1692(e) ("It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors"). It therefore provided that, barring application of one of the exclusions, an entity that "collects or attempts to collect . . . debts owed or due . . . another" on a regular basis qualifies as a debt collector *when it engages in collection activity on behalf of another*. *Id.* § 1692a(6). But when that same entity acts to collect its own debts, it is acting as a *creditor*, not a *debt collector*. *See id.* §§ 1692a(4), 1692a(6). Santander is therefore subject to the FDCPA only when acting as a "debt collector" as defined in § 1692a(6). Were it otherwise, every creditor that collects on its own loans and that also engages in the business of regularly collecting debts on behalf of others would be pulled under the regulation of the FDCPA not just when it collects for others, but also when it collects for itself.

At bottom, a valid claim under the FDCPA inherently requires the coming together of all the statutory elements at the time of and in connection with the prohibited conduct. Thus, for example, when a plaintiff claims that a defendant violated § 1692e (prohibiting a "debt collector" from using "any false, deceptive, or misleading misrepresentation or means in connection with the collection of any debt"), he

must prove that the defendant was acting as a debt collector, as defined by § 1692a(6), when it engaged in misrepresentations in connection with the collection of debt from the plaintiff.

* * *

Because the complaint failed to allege facts demonstrating that Santander was acting as a "debt collector," as defined by § 1692a(6), when it was collecting on debts owed by the plaintiffs, we affirm the judgment of the district court.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RICKY HENSON, *et al.*

Plaintiffs,

v.

SANTANDER CONSUMER USA, INC., *et al.*,

Defendants.

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Civil Action No. RDB-12-3519

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MEMORANDUM OPINION

This suit brought by Plaintiffs Ricky Henson, Ian Matthew Glover, Karen Paccouoloute, and Paulette House (collectively "Plaintiffs") against Defendants Santander Consumer USA, Inc. ("Santander"), NCB Management Services, Inc. ("NCB"), and Commercial Recovery Systems, Inc. ("CRS") concerns alleged violations of the Fair Debt Collection Practices Act ("FDCPA"), U.S.C. § 1692 *et seq*. Pending before this Court are Defendant Santander's Motion to Dismiss Pursuant to Rule 12(b)(6) (ECF No. 8) and Defendants NCB and CRS's Motion to Dismiss

Pursuant to Rule 12(b)(6) (ECF No. 10). The parties' submissions have been reviewed and no hearing is deemed necessary. *See* Local Rule 105.6 (D. Md. 2011). For the reasons stated herein, Defendant Santander's Motion to Dismiss (ECF No. 8) is GRANTED. Co-Defendants NCB and CRS's Motion to Dismiss (ECF No. 10) is GRANTED IN PART; specifically, the Motion is granted as to Defendant NCB only. With respect to Defendant CRS, this matter is stayed pending resolution of the bankruptcy proceedings against it, and the case will be administratively closed until that point.

BACKGROUND

This Court accepts as true the facts alleged in the Plaintiffs' Complaint. *See Aziz v. Alcolac, Inc.*, 658 F.3d 388, 390 (4th Cir. 2011). According to the Complaint, Plaintiffs each entered into Retail Installment Sale Contracts ("Contracts") with CitiFinancial Auto Credit, Inc., CitiFinancial Auto Corp., or CitiFinancial Auto, LTD (collectively "CitiFinancial Auto") for the purposes of financing motor vehicle purchases in the state of Maryland. Compl. ¶¶ 27-30, ECF No. 1. At some point after entering into the Contracts with CitiFinancial Auto, each Plaintiff failed to meet their payment obligations and defaulted. *Id.* at ¶ 32. CitiFinancial Auto subsequently repossessed and sold the Plaintiffs' motor vehicles, leaving a deficiency balance on the Plaintiffs' accounts. *Id.* at ¶¶ 33-37. A class action lawsuit ensued against CitiFinancial Auto in this Court, alleging that Citi had violated certain provisions of Maryland State law governing the repossession of motor vehicles. *Id.* at ¶¶ 38, 39; *see*

Complaint, *Thomas v. CitiFinancial Auto Credit, Inc.*, Civ. A. No. JKB-10-528 (D. Md. March 3, 2010), ECF No. 2. The parties ultimately entered into a settlement agreement approved by this Court on May 29, 2012 after conducting a fairness hearing, in which CitiFinancial Auto agreed to waive deficiency balances for class members.[1] Compl. ¶¶ 40-44. Class members also retained "any [potential] claims . . . that may be asserted against Santander Consumer USA Inc. or . . . any person or entities collecting on their behalf, arising from efforts to collect on Settlement Class Members' accounts." *Id.* at ¶ 46.

Plaintiffs contend that on or before December 1, 2011, Santander purchased the delinquent accounts from CitiFinancial Auto and was aware that the delinquent accounts were the subject of a class action lawsuit and settlement, which had been preliminarily approved. *Id.* at ¶ 48-50. After acquiring the delinquent accounts, Santander began efforts to collect debts originally owed to CitiFinancial Auto. *Id.* at ¶ 52. During these efforts Santander is alleged to have misrepresented (1) the amount of debt owed, and (2) its authority to collect such debt. *Id.* at ¶ 55.

After purchasing the delinquent accounts from CitiFinancial Auto, Plaintiffs aver that Santander hired Co-Defendants NCB and CRS to aid in the collection of debts it had acquired. *Id.* at ¶¶ 58, 70.

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[1] This Court preliminarily approved the settlement on November 14, 2011. Id. at ¶ 42. By the same order, class members were appointed counsel in the then-pending matter. Id.

With respects to NCB and CRS, Plaintiffs similarly contend that the Co-Defendants misrepresented the following during its collection efforts beginning on or about December 1, 2011: (1) the amount of debt owed, (2) its authority to collect such debt, and (3) the identity of the debt owner. *Id.* at ¶ 67, 75. There are no allegations that either NCB or CRS was aware of the class action lawsuit or settlement.

STANDARD OF REVIEW

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P 8(a)(2). Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes the dismissal of a complaint if it fails to state a claim upon which relief can be granted. The purpose of Rule 12(b)(6) is "to test the sufficiency of a complaint and not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006).

The Supreme Court's recent opinions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), "require that complaints in civil actions be alleged with greater specificity than previously was required." *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012) (citation omitted). The Supreme Court's decision in *Twombly* articulated "[t]wo working principles" that courts must employ when ruling on Rule 12(b)(6) motions to dismiss. *Iqbal*, 556 U.S. at 678. First, while a court must accept as true all the factual allegations contained in the complaint, legal conclusions drawn

from those facts are not afforded such deference. *Id.* (stating that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to plead a claim); *see also Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) ("Although we are constrained to take the facts in the light most favorable to the plaintiff, we need not accept legal conclusions couched as facts or unwarranted inferences, unreasonable conclusions, or arguments." (internal quotation marks omitted)).

Second, a complaint must be dismissed if it does not allege "a plausible claim for relief." *Iqbal*, 556 U.S. at 679. Under the plausibility standard, a complaint must contain "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. Although the plausibility requirement does not impose a "probability requirement," *id.* at 556, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678; *see also Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 291 (4th Cir. 2012) ("A complaint need not make a case against a defendant or *forecast evidence* sufficient to *prove* an element of the claim. It need only *allege facts* sufficient to *state* elements of the claim." (emphasis in original) (internal quotation marks and citation omitted)). In making this assessment, a court must "draw on its judicial experience and common sense" to determine whether the pleader has stated a plausible claim for relief.

Iqbal, 556 U.S. at 679. "At bottom, a plaintiff must nudge [its] claims across the line from conceivable to plausible to resist dismissal." *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) (internal quotation marks omitted).

ANALYSIS

Defendants Santander, individually, (ECF No. 8) and NCB and CRS, jointly, (ECF No. 10) have filed Motions to Dismiss Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons herein, Defendant Santander's Motion (ECF No. 8) is granted. As to Defendants NCB and CRS, the Motion is granted with respect to the claims made against Defendant NCB. However, this matter is stayed as to Defendant CRS pending resolution of its bankruptcy proceedings.

I. "Debt Collector" Under the FDCPA

Plaintiffs have failed to "allege facts that make it plausible to believe that [Defendant Santander] is in fact a debt collector as defined by the FDCPA" sufficient to withstand a Rule 12(b)(6) motion. *Givens v. Citimortgage, Inc.*, PJM-10-1249, 2011 WL 806463, at *2 (D. Md. Feb. 28, 2011); *Sparrow v. SLM Corp.*, RWT-08-00012, 2009 WL 77462, at *2 (D. Md. Jan. 7, 2009); *see also Johnson v. BAC Home Loans Servicing, LP*, 867 F. Supp. 2d 766, 777 (E.D. N.C. Sept. 29, 2011) (noting that a court must determine whether the defendant is a "debt collector" as contemplated by the FDCPA before assessing whether "Plaintiffs have validly stated claims of violations"); *Moore v. Commonwealth Trustees, LLC*, 2010 WL 4272984, at *2 (E.D. Va. Oct. 25, 2010)

(same). Under the FDCPA, a debt collector is defined as:

> [A]ny person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

15 U.S.C. § 1692a(6).

"The FDCPA does not, however, apply to creditors collecting debts in their own names and whose primary business is not debt collection." *Ramsay v. Sawyer Property Mgmt., LLC*, 948 F. Supp. 2d 525, 531 (D. Md. May 31, 2013) (quoting *Kennedy v. Lendmark Fin. Serv.*, RDB 10-02667, 2011 WL 4351534, at *3 (D. Md. Sept. 15, 20110)); *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 379 n. 2 (4th Cir. 2006) (quoting *Nielson v. Dickerson*, 307 F.3d 623, 634 (7th Cir. 2002)) ("[C]reditors who are attempting to collect their own debts generally are not considered debt collectors under the statute."); *Sterling v. Ourisman Chevrolet, Inc.*, 943 F. Supp. 2d 577, 586 (D. Md. May 2, 2013) (quoting *Eley v. Evans*, 476 F. Supp. 2d 531, 534 (E.D. Va. 2007)). Although, as a general matter creditors are exempt from liability under the FDCPA, a narrow exception exists where the purported creditor: "[1] received an assignment or transfer of a debt in default [and; [2] receives the same] solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. § 1692a(4) (the "assignee" exception).

A. Santander is Not a Debt Collector and the Assignee Exception is Inapplicable.

Plaintiffs have failed to allege facts sufficient to support the contention that Defendant Santander was acting as a debt collector. As explained above, a "debt collector" is (1) "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts" or (2) "any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." § 1692a(6); *Ramsay,* 948 F. Supp. 2d at 531.

There is no plausible allegation that Santander's primary business purpose is the collection of debts. *See generally* Compl., ECF No. 1; *cf.* Pls.' Opp'n Def. Santander's Mot. Dismiss, ECF No. 15, at 14, 15 n.6 (noting that "Santander *issues and services* tens of thousands of car loans each year" (emphasis added)). Instead Plaintiffs aver that Santander, as a non-originating debt buyer, falls within the definition of "debt collector" because it "regularly collects or attempts to collect debts owed or due" and acquired the Plaintiffs' accounts after default. *Id.* at 14-15. Plaintiffs assert that § 1692a(6) (defining "debt collector") applies to both the collection of debt "(1) owed or due (including debt originator and any non-originating debt buyer); or (2) asserted to be owed or due another (including debt servicer)." *Id.* at 9. Or put differently, Plaintiffs argue that the term "due another" does not modify "debts owed or due," but

only debts "asserted to be owed or due." Relying on § 1692a(6)(F)(iii),[2] Plaintiffs conclude that non-originating debt buyers (i.e. Santander) are subject to liability under the FDCPA where the debt acquired was in default.[3] Accordingly, Plaintiffs argue that Santander cannot shield itself using the creditor exemption because it is a "debt collector."[4]

In support of its Motion to Dismiss, Santander argues that it is a creditor exempt from liability under the FDCPA because it held the debt and collected the same on its own behalf. Def. Santander's Mem. Supp. Mot. Dismss, ECF No. 9, at 5-8.

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[2] Section 1692a(6)(F)(iii) states in pertinent part that "[t]he term [debt collector] does not include . . . any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . (iii) concerns a debt which was not in default at the time it was obtained by such person."

[3] Once again, this interpretation is premised on Plaintiffs' reading that the term "for another" modifies only debts "asserted to be owed or due."

[4] Plaintiffs do not expressly rely on the assignee exception to the creditor exemption; rather they assert that Santander is a "debt collector." See Pls.' Opp'n to Def. Santander, ECF 15, at 10 ("a non-originating debt buyer that purchases debt in default is not specifically excluded from the definition of 'creditor' because the non-originating debt buyer already falls under the definition of 'debt collector'").

Consequently, Santander asserts that the assignee exception does not apply precisely because Plaintiffs have not, nor could they have, alleged that Santander acquired the debt "solely for the purpose of facilitating collection of the debt of another." *See id.*; Def. Santander's Reply, ECF No. 17, at 1-4.

The gravamen of this dispute concerns the situations in which a debt buyer or assignee of a debt already in default is subject to liability under the FDCPA. According to the Complaint, Santander purchased the Plaintiffs' delinquent accounts "no later than December 1, 2011" and began its collection efforts "on or around December 1, 2011." Compl. ¶¶ 48, 52. In other words, Santander owned the debt at all times during its collection activities. *Id.* Moreover, "Santander issues and services tens of thousands of car loans each year." Pl.'s Opp'n Def. Santander, ECF No. 15, at 15 n.6. As a preliminary matter, Santander appears to fall under the FDCPA's definition of creditor precisely because Santander (1) "offers or extends credit creating a debt" in the form of car loans which it services and (2) is an entity "to whom debt is owed" as a result of being the assignee. *See* § 1692a(4). However, Santander may still be liable if it "receive[d] [the] assignment or transfer of debt [1] in default [2] solely for the purpose of facilitating collection of such debt for another." § 1692(a)(4). Plaintiffs have repeatedly stated that the debt was in default at the time of the transfer. Compl. ¶ 48; *see generally* Pls.' Opp'n Def. Santander, ECF No. 15. Whether Plaintiffs' have adequately pled facts showing that Santander acquired the debt "solely for the purpose of facilitating collection of such debt for

another" requires more scrutiny as the parties disagree as to the effect of the term "for another" in the statute.

This Court has had occasion to consider this issue of statutory interpretation before in *Ransom v. Telecredit Serv. Corp.*, 1992 U.S. Dist. LEXIS 22738 (D. Md. Feb. 5, 1992) and *Ademiluyi v. PennyMac Mortg. Inv. Trust Holdings I, LLC*, 929 F. Supp. 2d 502 (D. Md. Mar. 11, 2013). In *Ransom*, this Court determined that the defendant—whose business consisted of electronically verifying checks and offering to purchase and subsequently collect on every dishonored check—fell within the definition of a "debt collector" for the purposes of the FDCPA. *Ransom*, 1992 U.S. Dist. LEXIS 22738 at *3-5. In reaching this conclusion, the Court considered whether the assignee exception in § 1692(a)(4) required that the collections effort be "for another" as the plain language suggests. *Id.* at *19-20. The Court disagreed with such a strict reading of the statute in all instances, explaining that:

> [t]o say that [the assignee] exception applies only to those who collect debts for others would be to render the exception superfluous and meaningless; those who collect debts for others are not within the original definitional universe [of creditors], and there is therefore no need to exclude them.

Id. at 20-21 (quoting *Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480, 1485 (M.D. Ala. 1987)).

More recently in *Ademiluyi*, this Court considered on a motion to dismiss whether a non-originating debt buyer who purchases debt in default

and seeks to collect the debt for itself fell within the purview of the FDCPA. This Court noted, as a preliminary matter, that courts in other jurisdictions have "determined that it is appropriate to disregard the 'of another' language only where 'an artificial distinction between 'creditor' and 'debt collector' as a result of the 'for another' language would unfairly allow a debt collector to masquerade as a creditor.'" *Ademiluyi*, 929 F. Supp. 2d at 525 (quoting *Schlegel v. Wells Fargo Bank, N.A.*, 799 F. Supp. 2d 1100, 1105 (N.D. Cal. 2011)). Ultimately, however, this Court was unable to determine whether "strictly applying the 'for another' language would 'unfairly allow a debt collector to masquerade as a creditor'" because it was unable to determine whether "defendants purchase debts 'solely' for collection, or . . . for servicing." *Id.* at 526. Neither case, however, stands for the proposition that a debt-buyer is necessarily a "debt collector" where they acquire debt in default.

Plaintiffs have failed to allege facts making it plausible that Santander falls under the assignee exception. Unlike the defendant in *Ransom*, there is no indication that Santander "is not in the business of extending credit." *Ransom*, 1992 U.S. Dist. LEXIS 22738 at *15 (basing its decision, in part, on a prior ruling which held that the defendant "is a third party collecting a debt originally owed to another. . . . It is not in the business of extending credit") (quoting *Holmes v. Telecredit Serv Corp.*, 736 F. Supp. 1289, 1293 (D. Del. 1990)). Indeed, Plaintiffs expressly state that "Santander *issues* and services tens of thousands of car loans each year." Pl.'s Opp'n Def.

Santander, ECF No. 15, at 15 n.6 (emphasis added). Moreover, with respect to the collection activity concerning the Plaintiffs, there is no indication that Santander acquired the debt "solely for the purpose of collection" as opposed to servicing. To the contrary, Plaintiffs base their argument, in part, on the assertion that Santander acted as a servicer. *See id.* at 15 ("Santander does not dispute that Named Plaintiffs' debts were already in default at the time the debts were *acquired by Santander for servicing*.") (emphasis added). In other words, Plaintiffs have failed to allege that Defendant Santander is attempting to improperly "masquerade" or shield itself under § 1692(a)(4)'s creditor exemption precisely because Plaintiff affirmatively alleges that Santander acquires debts for servicing rather than just mere collection. The Plaintiffs' cursory assertions that Santander is a "debt collector" because it purchased debts in default do not create a plausible cause of action. Moreover, this Court cannot ignore Plaintiffs' failure to properly address the applicability of the § 1692(a)(4) assignee exception.

This Court also takes note of the fact that, while not binding, the District Court for the Eastern District of Virginia previously determined that Santander was a creditor exempt from liability under the FDCPA. *See Blagogee v. Santander Consumer USA, Inc.*, No. 1:11-CV- 680 AJT/TRJ (E.D. Va. Nov. 29, 2011), *aff'd per curiam*, 474 Fed. App'x 366 (4th Cir. 2012) (unpublished). The plaintiff in *Blagogee*, similarly alleged that Santander purchased and subsequently serviced and collected on an auto loan that was in default at the time of purchase. *See*

Verified Am. Compl. for J. at ¶¶ 2, 3, 21, *Blagogee v. Santander Consumer USA, Inc.*, No. 1:11-CV-680 AJT/TRJ (E.D. Va. Nov. 29, 2011). In granting Santander's motion to dismiss, the district court noted that the plaintiff "failed to allege, at a minimum, that Santander received it assignment 'solely for the purpose of facilitating collection of such debt *for another*.'" *Id.* at *2 (emphasis in original). Or put differently, the district court strictly applied the language "for another."[5] Although the decision was affirmed on appeal,[6] the Fourth Circuit has yet to

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[5] The district court did not address the case law addressing the statutory term "for another" in its opinion.

[6] Specifically, the Fourth Circuit issued an unpublished, per curiam opinion stating as follows:

> William A. Blagogee appeals the district court's order denying relief on his complaint alleging violations of the Truth in Lending Act, 15 U.S.C.A. §§ 1601 to 1667(f) (West 2009 & Supp.2012), and the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 to 1692p (2006). We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Blagogee v. Santander Consumer USA, Inc.*, No. 1:11–cv– 00680–AJT–TRJ (E.D. Va. filed Nov. 29, 2011 & entered Nov. 30, 2011). We dispense with oral argument

discuss whether the "for another" language contained in § 1692a strictly applies. Accordingly, this Court's interpretation of § 1692a(4) is guided by the decisions in *Ransom* and *Ademiluyi*.

B. Defendant Santander is Not Vicariously Liable for the Alleged Conduct of Co-Defendants NCB and CRS.

Plaintiffs also suggest that Santander is vicariously liable for the conduct of Co- Defendants NCB and CRS. Pls. Opp'n Def. Santander, ECF No. 15, at 2 n. 1. Contrary to Plaintiffs' assertions, this Court has previously held that a creditor is not ordinarily liable for the conduct of a debt collector acting on its behalf. *Ramsay v. Sawyer Prop. Mgmt., LLC*, 948 F. Supp. 2d 525, 535 (D. Md. 2013); *Fontell v. Hassett*, 870 F. Supp. 2d 395, 412 (D. Md. 2012). As discussed above, Santander owned the debt during the relevant time period and Plaintiffs have failed to demonstrate that Santander falls within the assignee exception to the creditor exemption. Moreover, there is no concern, nor is there any suggestion, that Santander employed the Co-Defendants NCB and CRS in an effort to shield itself from liability under

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because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.
AFFIRMED.

Blagogee v. Santander Consumer USA, Inc., 474 Fed. App'x 366 (4th Cir. 2012) (*per curiam*) (unpublished).

the FDCPA. Holding Santander vicariously liable would not further the purposes of the FDCPA; therefore, it would be inappropriate to do so. As previously discussed by this Court:

> [I]f the [Defendant] is not a debt collector subject to liability under the FDCPA itself, then its decision to hire [a debt collector] to engage in debt collection practices on its behalf would not be predicated on evading FDCPA liability, and imputing liability under those circumstances would not further the interests of the Act.

Fontell, 870 F. Supp. 2d at 412; *see also Ramsay*, 948 F. Supp. 2d at 535 (noting that because the defendant "is not a debt collector . . . [t]here is no concern . . . that [the defendant] employed [a collection agent] to avoid compliance with the FDCPA.").

II. Plaintiffs Have Failed to Meet the Pleading Standards of Rule 12(b)(6) Against Defendant NCB

Plaintiffs have failed to plead sufficient factual allegations supporting their claims against Defendant NCB. Plaintiffs allege that NCB, through its collection efforts, violated "Sections 1692c(a)(2), 1692(d), 1692e(2), 1692e(8), 1692e(10) and 1692f."[7]

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[7] The Complaint asserted that NCB violated *inter alia* "15 U.S.C. §§ 1692 (b); 1962c, 1962c(b), 1692d, 1692e, 1692e(2), 1692e(5), 1692e(10), 1692e(11), 1692f and 1692g(a)." Compl., ECF No. 1, at 12 ¶ 77. Plaintiffs have dropped several of these claims,

Pls.' Opp'n Defs. NCB and CRS's Mot. Dismiss, ECF No. 16, at 14. As explained below, this Court is unable to discern allegations in the Complaint which would support each of these claims.

Section 1692c(a)(2) prohibits a debt collector, without prior consent, from communicating with the consumer

> [I]f the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer[.]

Id. There are simply no allegations that Defendant NCB was aware of either the class action proceeding against CitiFinancial or that Plaintiffs' were represented by counsel. Indeed, Plaintiffs' only assert that Santander was aware of the pending lawsuit. Compl., ECF No. 1, at 9, ¶ 49; Pls.' Opp'n Defs. NCB and CRS, ECF No. 16, at 9-10.

Section 1692d prohibits conduct, "the natural consequence of which is to harass, oppress, or abuse." *Id.* There are no allegations that NCB engaged in any

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however, as indicated in its Reply. To be sure, the claims advanced against NCB are identical to those advanced against CRS. However, as discussed *infra*, this matter is stayed as to claims made against CRS.

such conduct. Rather, Plaintiffs cursorily assert that "[r]eceipt of a collection call or letter from a debt collector that has no legal ability to collect from the consumer is conduct that results in harassment and abuse." Pls.' Opp'n Defs. NCB and CRS, ECF No. 16, at 6. This assertion is premised on the claim that "Santander was not provided any contractual authority to collect from" the Plaintiffs. Neither claims, however, are supported by factual assertions whatsoever and therefore fail. Moreover, these assertions are inconsistent with Plaintiffs' allegations that "Santander purchased the delinquent [Plaintiffs'] accounts." Compl., ¶ 48.

Plaintiffs' Complaint also fails to provide adequate factual allegations to support the § 1692e(2), (8), and (10) claims. With respect to § 1692e(8), prohibiting debt collectors from "communicating . . . to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed," Plaintiffs have not provided any support that NCB had knowledge that the debts were being disputed. Rather, they only assert that Santander had knowledge that the debts were disputed "and failed to notify NCB." Pls.' Opp'n Defs. NCB and CRS, ECF No. 16, at 10. This is insufficient to establish that NCB was somehow aware of the disputed status of the debt. *See Robinson v. Greystone Alliance, LLC*, BPG-10-3658, 2011 WL 2601573 at *7 (D. Md. June 29, 2011) (quoting *Shah v. Collecto, Inc.*, 2005 WL 2216242, at *10 (D. Md. Sept. 12, 2005) ("[Section 1692e(8)] expressly requires knowledge.").

Plaintiffs' § 1692e(2) and (10), and likewise Plaintiffs' § 1692f claims, are dependent upon the notion that NCB misrepresented the amount of debt owed. This misrepresentation apparently stems from the then-pending status of the class action lawsuit against CitiFinancial. However, the alleged conduct of NCB occurred and ceased while the case was pending, and neither a final judgment nor a final settlement had been reached. Therefore, Plaintiffs cannot based their assertion that NCB misrepresented the amount of debt owed on either the lawsuit against CitiFinancial or the settlement agreement. In sum, Plaintiffs have failed to plead facts sufficient to support any of its conclusory legal assertions against Defendant NCB.

III. Automatic Stay as to Defendant CRS Pending Resolution of Bankruptcy Proceedings

Under 11 U.S.C. § 362(a), the filing of a bankruptcy petition "operates as a stay, applicable to all entities, of . . . the commencement or continuation . . . of a judicial . . . proceeding against the debtor that was . . . commenced before the commencement of the [bankruptcy proceeding]." *Id.* On or about November 19, 2013, Defendant CRS filed a voluntary bankruptcy petition, which is currently pending in the United States Bankruptcy Court for the Eastern District of Texas. Def.'s Suggestion Bankr. & Notice Automatic Stay, ECF No. 23, at 1. Because the instant case concerns the Plaintiffs' effort to, *inter alia*, collect or recover a claim against CRS and was initiated prior to the filing of CRS' bankruptcy

petition, this matter is stayed pending resolution of the bankruptcy proceeding.

CONCLUSION

For the reasons stated above, Defendant Santander's Motion to Dismiss (ECF No. 8) is GRANTED. Co-Defendants NCB and CRS's Motion to Dismiss (ECF No. 10) is GRANTED IN PART; specifically, the Motion is granted as to Defendant NCB only. With respect to Defendant CRS, this matter is stayed pending resolution of the bankruptcy proceedings against it, and the case will be administratively closed until that point.

A separate Order follows.

Dated: May 6, 2014

/s/
Richard D. Bennett
United States District Judge

APPENDIX C

FILED: April 19, 2016

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1187
(1:12-cv-03519-RDB)

RICKY HENSON; IAN MATTHEW GLOVER; KAREN PACOULOUTE, f/k/a Karen Welcome Kuteyi; PAULETTE HOUSE,
Plaintiffs - Appellants,

v.

SANTANDER CONSUMER USA, INC.,
Defendant - Appellee,

and

COMMERCIAL RECOVERY SYSTEMS, INC.; NCB MANAGEMENT SERVICES, INCORPORATED,
Defendants.

AARP; NATIONAL CONSUMER LAW CENTER; NATIONAL ASSOCIATION OF CONSUMER ADVOCATES; CIVIL JUSTICE, INC.; PUBLIC JUSTICE CENTER, INC.; MARYLAND

CONSUMER RIGHTS COALITION, INC.; ATTORNEY GENERAL OF MARYLAND,

Amici Supporting Appellants.

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court
/s/ Patricia S. Connor, Clerk

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AND
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Supreme Court, U.S.
FILED
NOV 16 2016
OFFICE OF THE CLERK

No. 16-349

IN THE
Supreme Court of the United States

RICKY HENSON, IAN MATTHEW GLOVER, KAREN PACOULOUTE, F/K/A KAREN WELCOME KUTEYI, and PAULETTE HOUSE

Petitioners,

v.

SANTANDER CONSUMER USA INC., COMMERCIAL RECOVERY SYSTEMS, INC., AND NCB MANAGEMENT SERVICES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Fair Debt Collection Practices Act (FDCPA) regulates the conduct of "debt collectors." The relevant definition of that term here includes any person who "regularly collects or attempts to collect . . . debts owed or due or asserted to be owed or due *another*." 15 U.S.C. § 1692a(6) (emphasis added). A "creditor," by contrast, is any person "who offers or extends credit creating a debt or *to whom a debt is owed*." § 1692a(4) (emphasis added).

In this case, Respondent Santander Consumer USA Inc., a full-service consumer-finance company, purchased $3.55 billion in receivables. A fraction of that purchase involved debt in default, including Petitioners' motor-vehicle loans. Santander then attempted to collect those debts for its own account.

The question presented is whether a full-service consumer-finance company that purchases and then seeks to collect debt in default for its own account is subject to the FDCPA as a "debt collector" that regularly collects or attempts to collect "debts owed or due or asserted to be owed or due another." § 1692a(6).

CORPORATE DISCLOSURE STATEMENT

Respondent Santander Consumer USA Inc. is owned in whole by Santander Consumer USA Holdings Inc., which is a publicly traded entity. Santander Consumer USA Holdings Inc. is owned in part by Santander Holdings USA, Inc.

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INTRODUCTION

The Fair Debt Collection Practices Act (FDCPA or the Act), 15 U.S.C. §§ 1692-1692p, regulates debt collectors. It is undisputed here that Respondent Santander Consumer USA Inc. owned Petitioners' debts at the time it sought to collect them. Petitioners' sole contention is that Santander was nevertheless collecting or attempting to collect "debts owed or due or asserted to be owed or due *another*," bringing it within the FDCPA's definition of "debt collector." § 1692a(6) (emphasis added). Petitioners' argument amounts to a complex work-around to avoid the import of the word "another."

Unanimous panels of the only two courts of appeals that have directly addressed this argument have agreed that it is wrong. In the summer of 2015, the Eleventh Circuit recognized that the argument could succeed "only if we rewrite the statutory text." *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1315 (11th Cir. 2015) (adding that "the statutory text is entirely transparent").

The Fourth Circuit reached the same conclusion in this case. Pet. App. 8a (citing the "plain language" of § 1692a(6)). As that court explained, Petitioners' position rests on an inference that Santander meets the definition of "debt collector" because one of the many *exclusions* from that definition does not apply. Pet. App. 15a. That theory, the court said, represents "upside-down logic that relies on an inaccurate premise and a negative pregnant that does not follow." *Id.*

No court of appeals has faced similar facts and rejected the reasoning adopted by the Eleventh Circuit in *Davidson* and the Fourth Circuit in this case. The older cases Petitioners cite to conjure a circuit split were argued or decided on different grounds or do not otherwise control future cases. *E.g.*, *FTC v. Check Investors, Inc.*, 502 F.3d 159 (3d Cir. 2007) (involving a different definition of "debt collector"); *Bridge v. Ocwen Fed. Bank*, 681 F.3d 355 (6th Cir. 2012) (holding that plaintiffs pleaded that another entity held the debt).

Equally important, this case is a poor vehicle for addressing the question presented. The FDCPA specifically defines "creditor." § 1692a(4). Here, the district court found that Santander qualified under that definition in part because of a factual concession on Petitioners' part. Consequently, even if this Court were to accept Petitioners' argument that Santander meets the definition of "debt collector," the decision would not be dispositive. For a ruling in favor of Petitioners to change the outcome, the Court would have to decide a tangential question about the ultimate classification of a party that fits within the definitions of *both* "creditor" and "debt collector."

Moreover, this case does not involve any issue of substantial national importance. Petitioners first contend that the supposed circuit split harms the debt-buying industry by allowing different regulatory regimes to coexist across the country. But Petitioners are in no position to speak to the interests of debt purchasers, and state-specific statutes establish an enormous patchwork of law in this area anyway.

Petitioners next discuss a few examples of debt purchasers behaving badly and posit that a parade of horribles could follow. But the Court need not take up this case to stem the abuses to which Petitioners point. Their argument fails to differentiate between companies whose principal purpose is debt collection—where an entirely different definition of "debt collector" under the FDCPA applies—and full-service consumer-finance companies like Santander and the large commercial banks involved in similar cases. Common sense dictates that the latter companies have strong incentives to cultivate their standing in the community and are thus less likely to commit abusive practices. The legislative history describes this line of logic by Congress in passing the FDCPA.

This Court should deny the Petition.

STATEMENT OF THE CASE

As the Complaint alleges, each Petitioner obtained a loan from CitiFinancial Auto to finance a motor-vehicle purchase and later defaulted. Pet. App. 5a. CitiFinancial Auto repossessed and sold Petitioners' vehicles, leaving a deficiency on their accounts. *Id.* On December 1, 2011, Santander purchased Petitioners' accounts from CitiFinancial Auto as part of a larger $3.55 billion package of receivables. *Id.*

The Complaint does not address the details of the purchase. Petitioners now suggest that Santander bought this debt in default and for "pennies on the dollar." Pet. 5. But as Santander has pointed out, most of the loan accounts were not in default when

purchased. Brief of Appellee at 56, *Henson v. Santander Consumer USA, Inc.*, 817 F.3d 131 (4th Cir. 2016) (No. 15-1187), 2015 WL 4932610, at *56 ("Far from being a purchase of defaulted debt for pennies on the dollar—as Plaintiffs intimate, but carefully do not directly allege—that transaction consisted of purchasing a portfolio of auto loan accounts valued at over $3 billion, most of which were not in default."). After purchasing the loans, Santander began attempting to collect them. Pet. App. 5a.

Petitioners filed a putative class action in November 2012, alleging violations of the FDCPA. Pet App. 5a-6a. Santander moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) on the ground that it is not a debt collector under the Act. Pet. App. 26a-35a. The district court granted the motion to dismiss. Pet. App. 40a.

The FDCPA generally regulates debt collectors, not creditors. The Act defines "debt collector" to include three groups: (1) any person who "uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts," (2) any person who "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another," and (3) any creditor who, "in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts." § 1692a(6). The Act defines "creditor," by contrast, as any person "who offers or extends credit creating a debt or to whom a debt is owed." § 1692a(4).

As Petitioners have conceded, "Santander issues and services tens of thousands of car loans each year." Plaintiffs' Opposition to Defendant Santander Consumer USA Inc.'s Motion to Dismiss the Complaint at 15 n.6, *Henson v. Santander Consumer USA, Inc.*, Civ. A. No. RDB-12-3519, 2014 WL 1806915 (D. Md. May 6, 2014), ECF No. 15 (hereinafter "Pls.' Opp'n"). "[T]here is no plausible allegation," the district court thus held, "that Santander's primary business purpose is the collection of debts" under the first definition of "debt collector," Pet. App. 28a—belying the Petition's statements that Santander is "in the business of purchasing defaulted debt," Pet. i, 5.

The district court then held that Santander did not qualify under the second definition of "debt collector" because it did not "regularly collect[] or attempt[] to collect . . . debts owed or due another," § 1692a(6). Pet. App. 28a. Petitioners' contrary argument, the court made clear, rested on two faulty premises. *See* Pet. App. 28a-29a & nn.2-3. The first was that the word "another" in § 1692a(6) attaches only to debts "asserted to be owed or due," not to debts "owed or due." The second was a negative implication from § 1692a(6)(F)(iii), which excludes from the definition of "debt collector" any person "collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." The district court rejected these arguments because Santander is the entity "to whom a debt is owed," among other things, and therefore meets the definition of "creditor" at § 1692a(4). Pet. App. 30a.

For two independent reasons, the district court rejected the proposition that Santander is not a creditor by virtue of the so-called "assignee exclusion." That provision excludes from the definition of "creditor" any person "to the extent that he receives an assignment or transfer of a debt in default *solely for the purpose of facilitating collection of such debt for another*." § 1692a(4) (emphasis added).

First and foremost, the district court made clear, Petitioners waived reliance on the assignee exclusion. Indeed, they declined to argue that Santander did not fit within the definition of "creditor" at all. Pet. App. 29a n.4 ("Plaintiffs do not expressly rely on the assignee exc[lusion] . . . .") (citing Pls.' Opp'n 10 (conceding that "a non-originating debt buyer that purchases debt in default is not specifically excluded from the definition of 'creditor' because the non-originating debt buyer already falls under the definition of 'debt collector'")). The court emphasized that it could "not ignore [this] failure." Pet. App. 33a.

Second, the district court concluded, "there is no indication that Santander acquired the debt 'solely for the purpose of collection' as opposed to servicing." Pet. App. 33a. To the contrary, the court found, Petitioners conceded that their debts were "'*acquired by Santander for servicing*.'" *Id.* (emphasis in original) (quoting Pls.' Opp'n 15). In sum, the court held, Santander qualifies as a creditor under the FDCPA in part because of a factual concession.[1]

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[1] Petitioners obtained a final judgment under Federal Rule of Civil Procedure 54(b). *Henson v. Santander Consumer USA, Inc.*,

The Fourth Circuit affirmed in a unanimous opinion by Judge Niemeyer. Pet. App. 2a. On appeal, Petitioners argued that the determining factor separating a creditor from a debt collector is whether the entity acquired the debt before or after default. Pet. App. 7a. They thus took the entirely new approach of contending that Santander is not a creditor and therefore must be a debt collector because of the assignee exclusion, a conclusion supposedly fortified by § 1692a(6)(F)(iii). Pet. App. 7a-8a.

This argument, the Fourth Circuit held, "contains several interpretational and logical flaws" and "ultimately stands in tension with [the FDCPA's] plain language." Pet. App. 8a. In sum:

> When arguing from the definition of *creditor*, [Petitioners] overlook the fact that the [assignee] exclusion applies only to a person who receives defaulted debt 'solely for the purpose of facilitating collection . . . *for another*.' Similarly, in relying on the exclusion in § 1692a(6)(F)(iii), they fail to address whether Santander fits under any definition of 'debt collector' before addressing whether the . . . exclusion applies.

Id. (internal citation omitted; emphasis in original).

Civ. A. No. RDB-12-3519, 2015 WL 433475, at *5-6 (D. Md. Feb. 2, 2015).

The Fourth Circuit thus concluded that "the default status of a debt has no bearing on whether a person qualifies as a debt collector under the threshold definition." *Id.* Rather, "[t]hat determination is ordinarily based on whether a person collects debt *on behalf of another* or *for its own account*, the main exception being when the 'principal purpose' of the person's business is to collect debt." *Id.* (emphasis in original). Santander, the court held, was "not a person collecting a debt *on behalf of another*, so as to qualify as a debt collector under the second definition, but *on behalf of itself*, making it a creditor." Pet. App. 14a (emphasis in original).

The Fourth Circuit also rejected Petitioners' fallback arguments. First, as relevant here, Petitioners again contended that "another" attaches only to the latter portion of the phrase "debts owed or due or asserted to be owed or due another" in the second definition of "debt collector." § 1692a(6). The court explained that "[w]hile Congress did break up the definition of debt collector in § 1692a(6), defining several distinct classes of persons who qualify . . . , it did not divide the 'regularly collects' phrase." Pet. App. 17a. As written, "the word 'another' modifies both 'owed or due' and 'asserted to be owed or due,' so that the phrase defines a debt collector as including a person who collects debt due another *or* asserted to be due another." *Id.* (emphasis in original).

Second, Petitioners argued that "owed or due . . . another" is ambiguous, such that it could refer to the time when debts were first incurred or the time of the collection activity in question. The court responded that "[i]nsofar as Congress was regulating debt-

collector conduct, defining the term 'debt collector' to include a person who regularly collects debts owed to another, it had to be referring to debts as they existed *at the time of the conduct* that is subject to regulation." Pet. App. 17a-18a (emphasis in original).

The Fourth Circuit denied a petition for rehearing en banc. Pet. App. 41a-42a.

REASONS FOR DENYING THE WRIT

Nothing about this case justifies granting cert. The question presented is narrow, concerning just one of three definitions of "debt collector." Both circuits that have thoroughly analyzed the arguments made by Petitioners here have rejected them for sound reasons rooted firmly in the text of the FDCPA. No other court of appeals has yet considered those decisions, let alone disagreed with them. Moreover, a significant vehicle problem wrought by a factual concession renders this case especially unsuitable for further review.

The problems with the Petition begin with the question presented. Petitioners state the question at a level of generality that has little to do with the decision below. This, in turn, creates the false appearance of a deep circuit split with dramatic public-policy implications.

As outlined above, the FDCPA generally regulates debt collectors, not creditors. The Act assigns each of these categories a threshold definition and then excludes specific persons from those definitions.

On the one hand, a "debt collector" is (1) any person who "uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts," (2) any person who "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another," or (3) any creditor who, "in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts." § 1692a(6). The Act excludes from the definition of "debt collector," however, any person "collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." § 1692a(6)(F)(iii).

On the other hand, a "creditor" is any person who "offers or extends credit creating a debt or to whom a debt is owed." § 1692a(4). But the Act excludes from this definition any person "to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." *Id.*

The main flaw in Petitioners' framing of the case stems from a refusal to differentiate between the three definitions of "debt collector." *See* Pet. i (stating the question presented as "[w]hether a company that regularly attempts to collect debts it purchased after the debts had fallen into default is a 'debt collector' subject to the [FDCPA]"). This case turns on only the second definition of "debt collector"—which covers any person who "regularly collects or attempts to collect . . .

debts owed or due or asserted to be owed or due another," § 1692a(6). Focusing on the actual statutory phrase in question makes the distortions underlying Petitioners' arguments clear.

I. Lower courts are not in conflict over the question presented.

Petitioners' statement that the Fourth Circuit "documented" a "deep, mature circuit conflict," Pet. 10, is quite a reach. This assertion rests on a single "*[b]ut see*" citation that includes no elaboration whatsoever. *See* Pet. 8, 18 (citing Pet. App. 12a). To the extent there is tension among lower courts, there is no "deep, mature circuit conflict." The Fourth Circuit did not say otherwise.

As for the supposed split: beyond the Fourth Circuit, the only other court of appeals that has fully considered the actual question presented here holds that the FDCPA's second definition of "debt collector" does not apply. The ostensibly contradictory decisions to which the Petition points are distinguishable or would otherwise not control a future case presenting this question. In any event, a robust trend demonstrates that lower courts are resolving any tension in favor of the Fourth Circuit's approach below.

A. The only other court of appeals that has fully considered the question presented agrees with the Fourth Circuit.

The Eleventh Circuit is the only other court of appeals that has fully considered the actual question presented in this case: whether a full-service

consumer-finance company that purchases and then seeks to collect debt in default for its own account can qualify as a "debt collector" under the FDCPA's second definition. And like the decision below, the Eleventh Circuit unanimously said no.

In *Davidson*, Capital One treated the plaintiff's credit-card account as in default at the time of acquisition. Relying primarily on the § 1692a(6)(F)(iii) exclusion, the plaintiff argued that "the line between creditors and debt collectors is drawn by the default status of the debt." 797 F.3d at 1314. That argument, the Eleventh Circuit responded, "effectively urges us to ignore" the Act's definition of "debt collector." *Id.* at 1315. "In contrast to the exclusion at § 1692a(6)(F)(iii)," the court explained, "the statutory definition of 'debt collector' applies without regard to the default status of the underlying debt." *Id.* at 1314. In other words, § 1692a(6)(F)(iii) "is an exclusion; it is not a trap door." *Id.* at 1315.

Moreover, the Eleventh Circuit continued, the plaintiff misplaced reliance on § 1692a(6)(F)(iii) for an additional reason. That exclusion applies only to any person "collecting or attempting to collect any debt owed or due or asserted to be owed or due *another*," § 1692a(6)(F)(iii) (emphasis added), and thus does not encompass a party seeking to collect a debt "owed or due to *him*," like Capital One. *Davidson*, 797 F.3d at 1315 n.6 (emphasis in original).

That misunderstanding, the Eleventh Circuit explained, also infected the plaintiff's interpretation of the same language in the second definition of "debt collector" at § 1692a(6) (emphasis added). *Id.* at 1315.

In effect, the court said, the plaintiff urged it to rewrite that definition to apply to any entity that seeks to collect debts "*originally* owed or due or originally asserted to be owed or due another." *Id.* (emphasis in original). "But," the court rejoined, "we are not in the business of rewriting statutes." *Id.* "The statutory text is entirely transparent," the court concluded. *Id.* "[T]here is no ambiguity in the words that Congress chose to employ." *Id.* at 1316. "Owed or due . . . another" means owed or due another.

Davidson is both correct and consistent with the Fourth Circuit's decision below.

The Ninth Circuit has also issued an opinion along the same lines. In *Schlegel v. Wells Fargo Bank, NA*, 720 F.3d 1204 (9th Cir. 2013), a mortgage originator assigned the plaintiffs' loan to Wells Fargo, which attempted to collect. The court explained that to declare Wells Fargo a "debt collector" under the FDCPA's second definition "would require us to overlook the word 'another'" in that provision. *Id.* at 1209. "The complaint makes no factual allegations from which we could plausibly infer that Wells Fargo regularly collects debts owed to someone other than Wells Fargo." *Id.* Moreover, the court continued, the statute cannot bear an interpretation whereby "'owed or due another' means 'originally owed or due another.'" *Id.*

The analysis in *Schlegel* did not discuss the default status of the debt at the time of acquisition. The Ninth Circuit's reasoning, however, strongly accords with the approach of the Fourth and Eleventh Circuits.

B. The supposedly contradictory decisions do not control the question presented.

The Third, Sixth, and Seventh Circuit cases to which the Petition points are not in any real conflict with the decision below.

To begin, the Third Circuit case of *Check Investors* turned on the Act's *first* definition of "debt collector," which applies where a business has the "principal purpose" of collecting debts, § 1692a(6). 502 F.3d at 174 (stating that Check Investors "is in business to . . . acquire seriously defaulted debt"); *id.* at 172 ("[T]here is no question that the 'principal purpose' of NTF's business is the 'collection of any debts' . . . . This is equally true of . . . Check Investors." (internal quotation marks omitted)).

The present case, by contrast, turns on the Act's *second* definition of "debt collector"—any person "who regularly collects or attempts to collect . . . debts owed or due or asserted to be owed or due another," § 1692a(6). At base, the parties here dispute—and the Fourth Circuit decided—what it means for a debt to be "owed or due . . . another." That question does not arise under the first definition, which applies where a business has the principal purpose of collecting "any debts," full stop, regardless of to whom they are owed or due.

Nor does the Sixth Circuit's *Bridge* decision reflect any conflict warranting additional attention. There, defendant Deutsche Bank argued that "it was exempt from the FDCPA because, as the purchaser of the debt, it is a creditor and not a debt collector." 681

F.3d at 357. But the complaint alleged that "there is no assignment of record to establish" that Deutsche had actually purchased the debt. *Id.* at 360; *see also id.* at 357.

In other words, the *Bridge* plaintiffs adequately pleaded that the debt was owed or due "another" at the time of collection in the ordinary sense of that term. *See Davidson v. Capital One Bank (USA), N.A.*, 44 F. Supp. 3d 1230, 1239 n.12 (N.D. Ga. 2014) (distinguishing *Bridge* on this ground), *aff'd*, 797 F.3d 1309 (11th Cir. 2015). By contrast, here, Santander undertook collection activities "*on behalf of itself.*" Pet. App. 14a (emphasis in original).

Moreover, *Bridge* noted that the defendants might also qualify as "debt collectors" under the FDCPA's third definition (regarding use of another name, § 1692a(6)) because they employed a law firm to threaten foreclosure. 681 F.3d at 360; *see also id.* at 357. *Bridge*, therefore, is doubly inapposite to the question presented in this case.

Seventh Circuit precedent likewise creates no conflict meriting this Court's involvement. The earliest case to which Petitioners point, *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003), turned on an entirely different issue than the one here. *Schlosser* identified "the question posed" as whether "mistaken assertions and collection activity" by the defendant, Fairbanks, "have any relevance to the application of the [§ 1692a(6)(F)(iii)] exclusion" or whether "it depend[s] only on the actual status of the loan when it was acquired." *Id.* at 537. In other words, Fairbanks argued that it was "not a debt collector

because the Schlossers' loan was not *actually* in default when Fairbanks acquired it." *Id.* at 536 (emphasis added).

Nothing in *Schlosser* suggests that the court considered—much less decided—the separate question of whether an assignee can be a "debt collector" under the second definition where it seeks to collect debt owed or due itself rather than owed or due another. In fact, much of the opinion suggests that the court did *not* consider this issue: from the statement of "the question posed," *id.* at 537, to the remark that Fairbanks "rel[ied] exclusively" on the § 1692a(6)(F)(iii) argument, *id.* at 539, to the stark omission of the word "another" when reciting the statutory text, *id.* at 538 (stating that "'such activity'" in § 1692a(6)(F) refers to "'collecting or attempting to collect any debt owed or due or asserted to be owed or due,'" period).

Indeed, Seventh Circuit judges disagree about whether *Schlosser* should be viewed as taking any position on the "owed or due . . . another" language in the second definition of "debt collector." In *McKinney v. Cadleway Properties, Inc.*, 548 F.3d 496 (7th Cir. 2008), Judge Manion wrote separately to explain that "the question of whether Fairbanks was a debt collector despite not attempting to collect the debt 'for another' never came up in *Schlosser*. . . . That issue was outside the scope of what this court . . . was addressing, and we did not consider it." *Id.* at 506 (Manion, J., concurring in part and concurring in the judgment).

McKinney held that the defendant's conduct did not violate the FDCPA. The court, therefore, did not need to address whether the defendant was a debt collector. *Id.* at 507. Nevertheless, the majority opinion did address that issue, mistakenly relying on *Schlosser*. *See id.* at 502 (majority op.) (stating that "under *Schlosser*, an agency in the business of acquiring and collecting on defaulted debts originated by another is a debt collector under the FDCPA even though it actually may be collecting for itself").

Most recently, in *Ruth v. Triumph Partnerships*, 577 F.3d 790 (7th Cir. 2009), the court repeated that a buyer of defaulted debt should be considered a debt collector. *Id.* at 796. But in that case, defendant Triumph Partnerships argued it was not a debt collector because it hired others to collect the debts for it. *Id.* In rejecting this argument, the Seventh Circuit never addressed whether Triumph fell under the first or second definition of "debt collector" and thus never grappled with the "owed or due . . . another" language in the latter. *See id.* at 796 (reciting both definitions); *id.* at 793 (describing Triumph as "a company that purchases defaulted debts and attempts to recover them," suggesting it may have qualified under the first definition).

The Seventh Circuit's crooked chain of decisions does not make a cert-worthy split. As an initial matter, where "the issue addressed in [a] passage [found in a previous opinion] was not presented as an issue, hence was not refined by the fires of adversary presentation," a later court "is free to reject" that passage as dictum. *United States v. Crawley*, 837 F.2d 291, 292-93 (7th Cir. 1988). This rule applies to the *Schlosser* and *Ruth*

language on which Petitioners rely. That is, the parties in those cases did not address the question presented here but, instead, argued other issues not directly pertinent to the court's comments about the default status of debt.

More fundamentally, the Seventh Circuit has never fully considered the question presented here. *Schlosser* ignored it, and *McKinney* short-circuited it. Fortunately, that failure is readily remediable. Seventh Circuit panels "are not absolutely bound" by prior panel pronouncements. *United States v. Reyes-Hernandez*, 624 F.3d 405, 412-13 (7th Cir. 2010). Instead, they "must give fair consideration to any *substantial* argument that a litigant makes for overruling a previous decision." *Id.* (emphasis in original). To the extent necessary, and in addition to the reasons below, the fact that *McKinney* rested on an obvious misunderstanding of *Schlosser* provides a substantial argument for overruling it. This Court should not and need not grant cert to correct the Seventh Circuit's misunderstanding of its own precedent. The Seventh Circuit can do so itself, even without en banc intervention.

Finally, Petitioners assert in a cursory manner that the Fifth Circuit and the D.C. Court of Appeals have issued rulings that conflict with the decision below. They are wrong.

In *Perry v. Stewart Title Co.*, 756 F.2d 1197 (5th Cir. 1985), the debt was not in default at the time of acquisition. *Id.* at 1208. And in context, there can be little doubt that the court's comment on default status simply summarizes the legislative history that it cites,

which, as relevant, concerns only servicing companies.[2]

In *Logan v. LaSalle Bank National Association*, 80 A.3d 1014 (D.C. 2013), the plaintiff failed to plead that the defendants met any aspect of the provision defining "debt collector." The court held that "appellant has not pleaded sufficient facts to support an inference regarding appellees' status as debt collectors under the Act" because "[t]he complaint includes no facts explaining [the relationship between the defendant entities], when either entity acquired an interest in the loan, the nature of that interest, or whether appellant was in default when it did so." *Id.* at 1021-22. The decision thus did not turn on the question presented here.

At bottom, there is no well-developed disagreement among lower courts that would merit this Court's further consideration.

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[2] *Compare* S. Rep. No. 95-382, at 3-4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698 ("[T]he committee does not intend the definition [of "debt collector"] to cover . . . the collection of debts, such as mortgages and student loans, by persons who originated such loans . . . [or] mortgage service companies and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing . . . ."), *with Perry*, 756 F.2d at 1208 ("The legislative history of section 1692a(6) indicates conclusively that a debt collector does not include the consumer's creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned." (citing S. Rep. No. 95-382, at 3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698)).

C. The timeline of decisions shows a trend favoring the approach below.

The timeline of the court of appeals decisions discussed in the Petition further reflects that there is no need for this Court's intervention. The handful of decisions Petitioners address at any length to support their view predate *all* of the decisions they admit support Santander's.

On the one hand: *Schlosser*, the Seventh Circuit case that had nothing to do with the question presented, came down in 2003, and its dubious progeny, *McKinney* and *Ruth*, date back to 2008 and 2009, respectively. The Third Circuit published *Check Investors* in 2007, and the Sixth Circuit, *Bridge* in 2012.

On the other hand: The Ninth Circuit issued *Schlegel* in 2013; the Eleventh Circuit issued *Davidson* in 2015; and the Fourth Circuit issued the decision here in 2016.

Thus, to the extent any conflict ever existed, it is fading away. All federal appellate courts that have considered the issue after 2012—and all that have fully evaluated Petitioners' various contentions—have agreed that a full-service consumer-finance company that purchases and then seeks to collect debt in default for its own account does not qualify as a "debt collector" under the second definition in the FDCPA. *Davidson*, from the summer of 2015, is the leading light in this area, and it has not drawn a word of disagreement. And each court with an older, purportedly differing decision on its books can

distinguish or overrule it, even absent en banc involvement.

II. This case is a poor vehicle for addressing the question presented.

This case suffers from a notable vehicle problem. The actual question presented here is whether Santander meets the second definition of "debt collector" in § 1692a(6). But even if Petitioners were to prevail on this issue, they would face another hurdle. At the district court, Petitioners conceded that Santander met the definition of "creditor." And they did so on factual grounds unrelated to any argument pressed here. This Court, therefore, could not issue a dispositive ruling in their favor simply by answering the question presented.

To provide more detail: Santander was obviously a person "to whom a debt is owed"—the threshold definition of "creditor" at § 1692a(4). Plaintiffs attempting to show that debt purchasers do not meet that definition normally point to the assignee exclusion. That is, they assert that debt purchasers are not "creditors" because they "receive[d] an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." § 1692a(4).

Petitioners, however, never made this argument before the district court—a "failure" the court said it could "not ignore." Pet. App. 33a. Even beyond that, the court said, there is "no indication" in the Complaint "that Santander acquired the debt 'solely for the purpose of collection.'" Pet. App. 33a. To the contrary, Petitioners conceded their debts were

"'*acquired by Santander for servicing*.'" Pet. App. 33a (emphasis in original) (quoting Pls.' Opp'n 15); *see also* Pet. App. 16a (pointing out that Petitioners attempted to replead facts relating to the assignee exclusion on appeal: "[T]he facts that the plaintiffs presume in their brief [to the Fourth Circuit] are not the facts of their complaint.").

Put differently, while Petitioners argue that Santander is a debt collector, they have also conceded as a factual matter unrelated to any argument before this Court that Santander is a creditor. This unusual wrinkle means this Court could not render a dispositive ruling for Petitioners on the question presented without facing a murky follow-up question about the proper classification of a party that is both a creditor and a debt collector.

This obstacle should preclude further review. To the extent the Court wants to address whether purchasers of debt in default are debt collectors under the FDCPA, it can and should await a case posing that issue as a clean legal question.

III. This case presents no issue of substantial national importance.

Petitioners offer two arguments that this case could have significant policy consequences. Neither withstands scrutiny.

First, Petitioners invoke a parade of horribles regarding abusive debt-collection practices that the decision below allegedly abets. They fail to show, however, that this has anything to do with the

FDCPA's second definition of "debt collector"—the only definition of that term in question here.

To be specific: Petitioners discuss "debt buyers" as a unified whole. Pet. 20-22. They do not distinguish between entities whose "principal purpose . . . is the collection of any debts"—and therefore fit within the Act's first definition of "debt collector"—and those that, instead, "regularly collect[] or attempt[] to collect . . . debts owed or due or asserted to be owed or due another"—and therefore fit within the second definition of "debt collector." § 1692a(6). That conflation is significant because this case concerns only the second definition.

Moreover, there is good reason to believe that the first definition of "debt collector" sufficiently captures those entities that are likely to engage in the kind of malicious conduct that Petitioners conjure. The Act's legislative history makes clear that "[t]he primary persons intended to be covered are independent debt collectors" because they "are the prime source of egregious collection practices." S. Rep. No. 95-382, at 2-3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696-97. "Unlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." *Id.* at 1696.

That legislative history does not describe full-service consumer-finance companies like Santander, not to mention large commercial banks like Capital One and Wells Fargo, the respective defendants in

Davidson and *Schlegel*. These companies are not one-off debt-collection agencies. They are conglomerate businesses whose standing in the community is critical to their success as lenders and loan servicers, among other things.[3]

The case law bears out these differing incentives. For instance, the Petition recites the ugly practices underlying *Check Investors* at length. Pet. 11-12 (detailing threats of arrest and other conduct). But *Check Investors* involved a company whose principal purpose was collecting debts, 502 F.3d at 172, 174, bringing it within the FDCPA's first definition of "debt collector." Likewise, the Petition dwells on assertions of appalling acts committed by a debt purchaser and its subsidiary. Pet. 20-21 (describing threats, harassment, offensive language, and misrepresentations). But those companies admitted that they were "debt collectors"—and likely fell within the first definition of that term. *See* Consent Decree, *United States v. Capital Acquisitions & Mgmt. Corp.*, No. 3:04-cv-50147 (N.D. Ill. Mar. 24, 2004), https://www.ftc.gov/sites/default/files/documents/cases/2004/03/040324cag0223222.pdf.

Petitioners' second policy argument posits that the supposed circuit split "disserves" the debt-buying industry, "which finds itself subject to dramatically

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[3] Moreover, to the extent any such entity sought to avoid sullying its good name by hiding behind another, the third definition of "debt collector" in the FDCPA would apply. *See* § 1692a(6) (extending the definition of "debt collector" to any creditor who, "in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts").

different federal requirements across a hodge-podge of states." Pet. 19. This argument rests on a faulty premise because there is no such split. And Petitioners do not speak for any industry of debt purchasers. In any event, such companies are already subject to a far wider variety of debt-collection legislation than spotty application of the FDCPA could ever entail. Many states enforce their own regulatory regimes, which may diverge significantly from the FDCPA. *See* 2 *Consumer Law Sales Practices and Credit Regulation* §§ 632, 674 (updated Sept. 2016) (discussing about a dozen "comprehensive" state laws regulating both creditors and debt collectors).

In short, this case does not present any issue of substantial national importance.

IV. The Fourth Circuit's decision below is correct.

The Fourth Circuit properly held that the second definition of "debt collector" in the FDCPA does not apply to a full-service consumer-finance company that purchases and then seeks to collect debt in default for its own account.

This is not a difficult case, for "there is no ambiguity in the words that Congress chose to employ." *Davidson*, 797 F.3d at 1316; *see also* Pet. App. 8a. The Act's second definition of "debt collector" covers any person that "regularly collects or attempts to collect . . . debts owed or due *another*." § 1692a(6) (emphasis added). It does not cover a company that collects debts owed or due *itself*. Petitioners do not seriously dispute that the loans at issue here were, at the time of Santander's collection efforts, owed or due Santander.

See Pet. 23. Nor could they. Thus, under the Act's plain text, Santander is not a debt collector.

At the same time, Santander does satisfy the equally plain definition of "creditor"—a person "who offers or extends credit creating a debt or *to whom a debt is owed.*" § 1692a(4) (emphasis added); *see* Pet. App. 14a.

Petitioners' counterarguments fail. First, they say, "owed or due . . . another" is ambiguous—and could mean "*at the time of origination*" just as much as "*at the time of collection.*" Pet. 24 (emphasis in original). That is not how the English language works. "[O]wed or due . . . another" describes debts that an entity "*collects* or *attempts* to collect"—present-tense verbs. § 1692a(6) (emphasis added). By way of analogy, when one says that "the librarian regularly collects books placed on the table," there is no question that "placed on the table" refers to the location of the books *at the time of collection* and not at some previous time. And the definition of "creditor" plainly references the present in covering any person "to whom a debt *is* owed." § 1692a(4) (emphasis added). There is no reason to think that the definition of "debt collector" would reference some other time.

Moreover, the legislative history states that "the term 'debt collector'" was meant "to cover all *third persons* who regularly collect debts *for others*," S. Rep. No. 95-382, at 3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1697 (emphasis added)—not companies that

collect debts previously due others but now due themselves. *See* Pet. App. 11a-12a, 17a-18a.[4]

Second, Petitioners contend that the Act resolves the false ambiguity surrounding the meaning of "owed or due . . . another" by excluding from the definition of "debt collector" any person "collecting or attempting to collect any debt . . . owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." § 1692a(6)(F)(iii). This exclusion, Petitioners contend, shows by "necessary implication" that "assignees of defaulted debt are otherwise included as 'debt collectors' under the provision's main definition." Pet. 24-25.

That theory is too clever by half. It improperly elevates a negative inference from a definitional exclusion over the definition itself. As the Eleventh Circuit explained, "this argument is not persuasive because § 1692a(6)(F)'s exclusions do not obviate the substantive requirements of § 1692a(6)'s definition."

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[4] Here, Petitioners decline to repeat an argument they made below—that "another" attaches only to debts "asserted to be owed or due," not to debts "owed or due." *See* Pet. App. 28a-29a. The Fourth Circuit correctly rejected that argument, Pet. App. 17a, on the ground that "[w]hen [multiple] words are followed by a clause which is applicable as much to the first . . . as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Paroline v. United States*, 134 S. Ct. 1710, 1721 (2014). Indeed, the Supreme Court has expressly attached "another" to debts "owed." *Heintz v. Jenkins*, 514 U.S. 291, 293 (1995) ("The Act's definition of the term 'debt collector' includes a person 'who regularly collects or attempts to collect, directly or indirectly, debts owed [to] . . . another." (alterations in original)).

Davidson, 797 F.3d at 1314. If Santander does not meet the threshold definition of "debt collector," the exclusions from that term are irrelevant. *See* Pet. App. 14a-15a.

Moreover, this argument equates one who "obtain[s]" debt in default with one who owns such debt outright. Obtainment, however, can denote mere possession, not ownership. *See Black's Law Dictionary* 1247 (10th ed. 2014) (defining "obtain" as "[t]o bring into one's own possession").

Here, we know that Congress intended that this exclusion apply to "mortgage service companies and others who service outstanding debts for others"—that is, entities that do not own the underlying obligations—"so long as the debts were not in default when taken for servicing"—that is, when obtained. S. Rep. No. 95-382, at 3-4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698; *see* Pet. App. 14a-15a. Because this exclusion encompasses other parties, there is no reason to conclude that debt purchasers must fit within the Act's main definition. Petitioners' "necessary implication" is not necessary at all.

Third, Petitioners observe that the exclusion from the definition of "debt collector" in § 1692a(6)(F)(iii) is "roughly parallel" to the assignee exclusion from the definition of "creditor" in § 1692a(4). Pet. 25. They thus argue that the provisions should "work in tandem" by turning on the default status of debt at the time of acquisition. Pet. 25-26. "[O]ne who collects a debt obtained before it went into default is a creditor, not a debt collector; one who obtains the debt

after default is a debt collector, not a creditor," Petitioners say. Pet. 26.

This forced simplicity mangles the text of the FDCPA. In addition to rewriting the phrase "owed or due . . . another" in both the definition of "debt collector" at § 1692a(6) and the exclusions at § 1692a(6)(F), Petitioners' interpretation negates the assignee exclusion's explicit limitation to debt acquired "solely for the purpose of facilitating collection of such debt for another," § 1692a(4). That cannot be correct.

Moreover, the provisions can work in tandem without forcing an unnatural reading on the FDCPA. The assignee exclusion from the definition of "creditor" appears to refer to mortgage servicers and similar entities, just like the § 1692a(6)(F)(iii) exclusion. A mortgage servicer, after all, could fit within the definition of "creditor" because one could say that a debt is "owed" to the entity to whom he writes a check each month. § 1692a(4). Under this interpretation, the Act provides that, except for servicing companies, one who collects a debt owed himself is a creditor, whereas one who collects a debt owed another is a debt collector. For servicing companies, which occupy a gray area between creditors and debt collectors, the distinction turns on the default status of debt at the time of acquisition.

Finally, Petitioners cite recent statements by the FTC and CFPB. But any agency interpretation contrary to the decision below would be inconsistent with the FDCPA's unambiguous language and would thus not warrant deference. *See Chevron, U.S.A., Inc.*

v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). Moreover, given the coming change in administrations, it is unclear whether the agencies will retain the same positions.

In sum, Petitioners point to no lower-court conflict that this Court needs to correct, and this case would provide a poor vehicle for addressing the question presented anyway. No issue of substantial national importance is at stake. And the decision below is correct.

CONCLUSION

For the forgoing reasons, this Court should deny the Petition.

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IN THE

Supreme Court of the United States

RICKY HENSON, IAN MATTHEW GLOVER, KAREN PACOULOUTE, F/K/A KAREN WELCOME KUTEYI, AND PAULETTE HOUSE,

Petitioners,

v.

SANTANDER CONSUMER USA, INC., COMMERCIAL RECOVERY SYSTEMS, INC., AND NCB MANAGEMENT SERVICES, INC.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Santander contends that petitioners' claim of an important circuit conflict depends on conflating the definitions of a "debt collector." Specifically, it argues that this case concerns only a debt buyer that "regularly collects" debts (the second definition), as opposed to debt buyers whose "principal purpose" is debt collection (the first definition). It then claims that only two courts of appeals have decided whether purchasers of defaulted debt are covered by the second, "regularly collects" definition and both have held that they are not. BIO 1. At the same time, Santander tries to suggest that the first definition answers any concerns about debt buyers abusing consumers because collecting defaulted debt is the "principal purpose" of the worst debt buyers and because the first definition might apply even if the debt is owed to the collector. BIO 3. These arguments fail.

First, Santander simply mischaracterizes the decisions in the circuit conflict. The majority view in the circuits is that a company that "regularly collects" purchased defaulted debt is a "debt collector" subject to the FDCPA.

Second, there is no assurance that the "bad" debt purchasers will be subject to FDCPA regulation in the Fourth Circuit under the first definition of a "debt collector." Indeed, defendants whose "principal purpose" is the collection of defaulted debt have argued elsewhere that even if they fall within the first definition, they are not covered. Specifically, consistent with the decision below, they argue that having purchased the debt, they are the persons "to

whom a debt is owed," 15 U.S.C. § 1692a(4), and are therefore creditors exempt from the Act. *See, e.g.*, *FTC v. Check Investors, Inc.*, 502 F.3d 159, 172 (3d Cir. 2007). Nothing in the Fourth Circuit's decision holds otherwise.

In the end, coverage of "principal purpose" collectors turns on the same basic questions raised in "regularly collects" cases and posed by this petition. *See id.* This Court should grant the petition and thereby resolve the Act's coverage for both kinds of defendants.

I. Certiorari Is Warranted To Resolve The Circuit Conflict.

A. The Circuit Conflict Is Real.

The circuit conflict over the Question Presented is acknowledged by courts,[1] the federal government,[2] commentators,[3] and even the Chamber of Commerce.[4] Santander's effort to prove them all wrong is unconvincing.

1. ***Seventh Circuit.*** We begin with respondents' most far-fetched claim – that the law of the Seventh Circuit is "not in any real conflict with the decision below." BIO 14.

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[1] Pet. App. 12a.

[2] *See* Pet. 17.

[3] *See, e.g.*, Jolina Cuaresma, Katherine Lamberth, and Brent Yarborough, *Do You Think Banks Are Debt Collectors? The CFPB and the FTC Do*, ABA BUS. L. TODAY 1, 2 (Oct. 2016).

[4] Br. Chamber of Commerce, *Midland Funding, LLC v. Johnson* 7 & n.2, No. 16-348.

The defendant in *Ruth v. Triumph Partnerships*, 577 F.3d 790 (7th Cir. 2009), made the same basic argument the Fourth Circuit accepted in this case, claiming it was "a creditor and not a debt collector because it purchases delinquent debt thereby becoming one 'to whom a debt is owed' under § 1692a(4)." *Id.* at 796; *see* Pet. App. 14a. The Seventh Circuit held that this "argument is foreclosed by our precedents." *Id.* Because "the debts at issue in this case were already in default when it acquired them," the court's decisions in "*Schlosser* [*v. Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003)] and *McKinney* [*v. Cadleway Properties, Inc.*, 548 F.3d 496 (7th Cir. 2008)] compel the conclusion that Triumph Partnerships is a debt collector under the FDCPA and is, therefore, subject to its provisions." *Id.* at 797.

Santander suggests that *Ruth* could have been decided on another ground. BIO 17 (stating that opinion "suggest[ed]" the defendant "may have" qualified under the first definition). But that manifestly was not the actual basis for the decision. And, in any event, *McKinney* applied the same rule to a defendant that unambiguously fell only under the second definition. *See* 548 F.3d at 502.

Given *Ruth*'s clarity, Santander's attempts to distinguish earlier circuit precedent are beside the point. They are also meritless. Santander says that the extended discussion of the Question Presented in *Schlosser* was dicta and points out that Judge Manion agreed with that position in *McKinney*. BIO 15-16. But the *majority* in *McKinney* took the opposite view. *See* 548 F.3d at 501. Santander is then forced to claim that the *McKinney* majority's

conclusion is dicta because the court went on to find that the debt collector did not violate the FDCPA. BIO 17. But that just means the court issued two alternative holdings. And "alternative holdings . . . are still entitled to precedential weight." *Whetsel v. Network Prop. Servs., LLC*, 246 F.3d 897, 903 (7th Cir. 2001).

2. ***Third Circuit.*** Santander similarly argues that *Check Investors* "turned on the Act's *first* definition of 'debt collector'" and the Third Circuit therefore had no occasion to decide the critical question under the second definition – *i.e.*, "what it means for a debt to be 'owed or due . . . another.'" BIO 14. But *Check Investors* discussed the "owed . . . another" phrase, and its parallel language in the definition of a "creditor," at length. *See* 502 F.3d at 171-73. It did so because the defendant argued that regardless of whether it qualified as a "debt collector" under the definition of that term, it nonetheless would be exempt from FDCPA coverage if it qualified as a "creditor." *Id.* at 172. The Third Circuit addressed that argument by interpreting the statute as a whole, including both the "debt collector" and "creditor" definitions, as well as their parallel exceptions. *Id.* at 172-74. Its conclusion established the law of the Third Circuit on the question presented by the petition, holding that "one attempting to collect a debt is a 'debt collector' under the FDCPA if the debt in question was in default when acquired," while "an entity is a creditor if the debt it is attempting to collect was not in default when it was acquired." *Id.* at 173.

Courts in the Third Circuit have applied this test to all debt purchasers, including consumer-finance

companies. For example, in *Oppong v. First Union Mortgage Corp.*, the plaintiff sued Wells Fargo, which had acquired the plaintiff's mortgage after it had gone into default. 215 F. App'x. 114, 115-116 (3d Cir. 2007). The court acknowledged that "Wells Fargo is not an entity whose 'principal purpose' is to collect others' debt." *Id.* at 118. But it held that the statutory definition "does not exclude an entity in Wells Fargo's position who has acquired a debt that was already in default." *Id.*; *see also, e.g., Loveless v. Bank of America, N.A.*, No. 13-cv-1546, 2014 WL 4437576, at *8-*9 (M.D. Pa. Sep. 9, 2014) (applying circuit rule to Bank of America); *DeHart v. U.S. Bank, N.A. ND*, 811 F. Supp. 2d 1038, 1056 (D.N.J. 2011) (same for U.S. Bank).

Indeed, because the *Check Investors* test applies to all debt purchasers in the Third Circuit, courts there regularly fail even to ask whether collecting defaulted debts was the defendant's principal business or only a regular part of its activities. *See Evankavitch v. Green Tree Servicing, LLC*, 793 F.3d 355, 358 n.2 (3d Cir. 2015); *Hoen v. FCC Finance, LLC*, 126 F. Supp. 3d 472 (D.N.J. 2015); *Veras v. LVNV Funding, LLC*, No. 13-1745, 2014 WL 1050512, at *2-*3 (D.N.J. Mar. 17, 2014).

3. ***Sixth Circuit***. Santander likewise cannot deny that in *Bridge v. Ocwen FederalBank, FSB*, 681 F.3d 355 (6th Cir. 2012), the Sixth Circuit expressly embraced "the holdings of other circuits" that "[f]or an entity that did not originate the debt in question but acquired it and attempts to collect on it, that entity is either a creditor or a debt collector depending on the default status of the debt at the

time it was acquired." *Id.* at 359 & n.3 (citing *Check Investors* and *Schlosser*).

Instead, Santander argues the analysis was dicta because the case was resolvable on another ground, namely that there was no valid assignment of the debt. BIO 14-15. While the court did note that allegation in the complaint, it did not rest its decision on that ground alone. *See* 681 F.3d at 360 (explaining that Complaint also alleged that claimed debt "was already in default at the time [defendants] obtained it"). It later stated its holding in unambiguous terms: "Therefore, we hold that the definition of debt collector pursuant to § 1692a(6)(F)(iii) includes any non-originating debt holder that either acquired a debt in default or has treated the debt as if it were in default at the time of acquisition." 681 F.3d at 362.

Santander may complain that the Sixth Circuit could have written a narrower opinion, but it cannot reasonably deny that this holding established the law of the circuit on the Question Presented, including for consumer-finance companies like Santander. *See, e.g.*, *Dahl v. First Franklin Loan Servs.*, No. 13-13599, 2014 WL 6686769, at *5-*6 (E.D. Mich. Nov. 26, 2014) (Bank of America debt collector under *Bridge* test); *Bridge v. Ocwen Fed. Bank*, No. 7-cv-2739, 2014 WL 2442183, at *7-*9 (N.D. Ohio May 30, 2014) (same for Deutsche Bank); *Castellanos v. Deutsche Bank*, No. 11-cv-815, 2012 WL 2684968, at *6-*8 (S.D. Ohio July 6, 2012) (same).

4. ***Fifth Circuit***. Santander briefly argues that the Fifth Circuit intended its invocation of the majority rule in *Perry v. Stewart Title Co.*, 756 F.2d 1197 (5th Cir. 1985), as simply a rendition of the

legislative history. BIO 18-19. But *Miller v. BAC Home Loans Servicing, L.P.*, 726 F.3d 717 (5th Cir. 2013), makes clear the Fifth Circuit treats *Perry* as establishing a real precedent. *Id.* at 722. The court further eliminated any ambiguity by "expressly adopt[ing]" the Third Circuit's rule to the same effect. *See id.* at 722 n.5.

* * * * *

There is no prospect that this conflict will resolve itself without this Court's intervention. Courts in the majority camp have fully engaged the simplistic "plain language" argument Santander advances and the Fourth and Eleventh Circuits embraced. *See, e.g.*, *Check Investors*, 502 F.3d at 172-73; *Schlosser*, 323 F.3d at 536. And courts on both sides of the divide have denied petitions for rehearing en banc. *See* Pet. 18; *McKinney*, *supra* (rehearing denied Dec. 30, 2008); *Schlosser*, *supra* (rehearing denied Apr. 16, 2003). Finally, neither party believes that an agency could resolve the conflict. *See* Pet. 18; BIO 30.

B. The Question Presented Is Important.

Santander does not contest that the petition presents a recurring question that can determine the outcome of important litigation. Indeed, as the citations above reflect, the question arises with great frequency. *See also* Michael A. Rosenhouse, *What Constitutes "Debt Collector" for Purposes of Fair Debt Collection Practices Act (15 U.S.C.A. § 1692a(6))*, 173 A.L.R. Fed. 223 §§ 3-4, 8.2, 16 (originally published 2001) (collecting many more cases). That is reason enough to resolve the split.

Santander argues that the question is unimportant because the worst abusers of defaulting

consumers are companies whose principal purpose is collecting purchased debt. And, it tries to assure the Court, those defendants will be subject to the Act regardless of the outcome of the Question Presented. BIO 3, 23. But that confidence is unwarranted. As noted, "principal purpose" debt collectors argue that they are exempt creditors because, as the Fourth Circuit concluded, they are the entities "to whom a debt is owed" and are collecting on their own account not collecting debts "for another." 15 U.S.C. § 1692a(4); *see* Pet. App. 8a, 19a. Santander makes the same suggestion in its vehicle objection. BIO 21-22. Certainly, the Fourth Circuit's decision does not hold otherwise.

In any event, even if the Question Presented governed only consumer-finance companies like Santander, it would warrant review. *See* FTC Amicus Br. Supporting Rehearing En Banc, *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309 (11th Cir. 2015). As this case and the cases cited above indicate, many consumer-finance and other companies regularly purchase defaulted debt in addition to their other lines of business. In fact, the company identified by the Federal Trade Commission as the largest purchaser of defaulted debt in 2013, Sherman Financial Group LLC, advertises itself as engaging in a broad range of financial services.[5]

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[5] *See* Federal Trade Commission, The Structure and Practices of the Debt Buying Industry, at tbl.1 (2013); *Investment History*, Sherman Financial Group, http://www.sfg.com/home/inner/.

Whether consumers subject to collection efforts by these companies are protected by the FDCPA should not vary from circuit to circuit.

Finally, Santander claims uniform application of the FDCPA is of no importance to its industry because debt collectors are already subject to potentially conflicting state laws. BIO 24-25. But a leading debt purchaser recently told this Court otherwise, explaining that "the existence of disparate [FDCPA] rules in different circuits governing the same conduct is of significant practical importance for institutional creditors" and is "particularly untenable for nationwide entities." Pet. 16, 17, *Midland Funding, LLC v. Johnson*, No. 16-348. This Court granted the petition. *See* 137 S. Ct. –, 2016 WL 4944674 (Oct. 11, 2016).

II. Santander's Vehicle Objection Is Meritless.

Santander says that resolving the Question Presented will not decide this case because petitioner allegedly conceded Santander is a creditor in the district court. BIO 2. Not so.

Santander points to the district court's cryptic statement that it "cannot ignore Plaintiffs' failure to properly address the applicability of the § 1692(a)(4) assignee exception." BIO 21 (citing Pet. App. 33a). Whatever that means, it is not a finding of any concession or waiver, as demonstrated by the fact that the court engaged in a full analysis of the assignee exception. *See* Pet. App. 30a-33a. In fact, petitioner *did* address the assignee exception, while focusing on the definition of "debt collector," a focus the Fourth Circuit ultimately agreed was correct. *See* Plaintiffs' Opp. to MTD 5, 7, ECF No. 15; Pet.

App. 15a. When Santander tried to argue waiver on appeal, petitioner explained what happened to the Fourth Circuit, Pet. C.A. Reply Br. 14 n.4, which notably found no concession or waiver.

Santander also notes in passing that the district court stated that there was "no indication" that "Santander acquired the debt 'solely for purpose of collection" rather than "servicing." BIO 21-22 (quoting Pet. App. 33a). But as the Fourth Circuit explained, the Complaint plainly alleged otherwise, Pet. App. 16a. Santander likewise admits in this Court that it purchased the debts for collection. BIO 3.[6]

III. The Fourth Circuit Decision Is Wrong.

Santander's defense of the decision below on the merits also provides no basis to deny cert.

Santander says it is obvious that debt purchasers are not attempting to collect debts "owed . . . another." BIO 25. But the definitional provision must be read as a whole, including its exclusion of those collecting a debt "which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii). The Fourth Circuit's interpretation does more than simply ignore a "negative inference"

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[6] The Complaint did allege that Santander originally acquired the debts for servicing, before purchasing the accounts. Complaint ¶ 47. The Fourth Circuit rejected petitioners' argument that because the debts were in default at the time of the initial contract for servicing, Santander was a debt collector at the outset and remained one even after buying the debt. Pet. App. 16a; BIO 22.

arising from this exclusion. BIO 27. It renders the exclusion completely surplusage. On the Fourth Circuit's reading, anyone who qualifies for the exemption because it "obtained" a debt prior to default has no need of the exemption because it would not qualify as a "debt collector" under the main definition anyway (because the debt would be owed to the company that obtained it, not to "another"). *See* Pet. 24-25.

Santander's only answer is suggest debt servicers might be able to "obtain" a loan without "own[ing it] outright." BIO 28. "Obtainment," Santander says, "can denote mere possession, not ownership." *Id.* But Santander never explains what it means to merely "possess" a debt. A debt is a contractual obligation, not a physical thing. One who obtains a debt through assignment obtains the right to enforce the contractual rights, extinguishing the assignor's rights. *See* Restatement (Second) Contracts § 317(1); *see also id.* ill. 1 ("A has a right to $100 against B. A assigns his right to C. A's right is thereby extinguished, and C acquires a right against B to receive $100.").

Santander also fails to distinguish itself from the debt servicers it admits are subject to the FDCPA if they are assigned a debt after it has gone into default. *See* BIO 29. Debt servicers and purchasers "obtain" debts in exactly the same sense because they obtain the debts through precisely the same way, through an assignment. *See* Pet. App. 15a-16a; 15 U.S.C. § 1692a(4). Yet Santander argues that purchasers of defaulted debt are never debt collectors, while servicers of defaulted debt are. How

that view can be squared with the statute's language and purposes, Santander cannot say.

Is it thus easy to see why no court has accepted Santanders' novel argument, and why the only courts of appeals to have accepted Santander's bottom-line position have done so by simply ignoring the surplusage their interpretations create.

The majority of circuits properly conclude instead that:

> [f]or those who acquire debts originated by others, the distinction drawn by the statute – whether the loan was in default at the time of the assignment – makes sense as an indication of whether the activity directed at the consumer will be servicing or collection. If the loan is current when it is acquired, the relationship between the assignee and the debtor is, for purposes of regulating communications and collection practices, effectively the same as that between the originator and the debtor. If the loan is in default, no ongoing relationship is likely and the only activity will be collection.

Schlosser, 323 F.3d at 538.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

RICKY HENSON, IAN MATTHEW GLOVER, KAREN PACOULOUTE, F/K/A KAREN WELCOME KUTEYI, AND PAULETTE HOUSE,

Petitioners,

v.

SANTANDER CONSUMER USA, INC.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
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JOINT APPENDIX

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APPENDIX A

Relevant Court of Appeals Docket Entries

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02/24/2015	1	Case docketed. Originating case number: 1:12-cv-03519-RDB. Case manager: DLett. [15-1187] (DL)
06/12/2015	19	BRIEF by Appellants Ian Matthew Glover, Ricky Henson, Paulette House and Karen Pacouloute in electronic and paper format. Type of Brief: OPENING. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 06/12/2015. [999601225] [15-1187] Cory Zajdel
06/12/2015	20	FULL ELECTRONIC APPENDIX and full paper appendix by Appellants Ian Matthew Glover, Ricky Henson, Paulette House and Karen Pacouloute. Method of Filing Paper Copies: mail. Date paper copies mailed dispatched or delivered to court: 06/12/2015. Has district court 90-day restriction expired for all transcripts included in appendix? Not applicable. The electronic appendix is initially

		restricted to case participants only. Case participants must be logged into CM/ECF to view the appendix prior to public release. Appendices in Immigration and Social Security cases will remain restricted.[999601227] [15-1187] Cory Zajdel
06/19/2015	23	AMICUS CURIAE/INTERVENOR BRIEF by Amicus Curiae AARP in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. [999606201] [15-1187] Julie Nepveu
06/19/2015	29	AMICUS CURIAE/INTERVENOR BRIEF by Amici Supporting Appellant Attorney General of Maryland, Civil Justice, Inc., Maryland Consumer Rights Coalition, Inc., National Association of Consumer Advocates, National Consumer Law Center and Public Justice Center, Inc. in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 06/23/2015. [999606872] [15-1187] (DL)
08/17/2015	48	BRIEF by Appellee Santander

		Consumer USA, Incorporated in electronic and paper format. Type of Brief: RESPONSE. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 08/17/2015. [999641382] [15-1187] Kim Watterson
08/26/2015	50	SUPPLEMENTAL AUTHORITIES (FRAP 28(j)) by Appellee Santander Consumer USA, Incorporated. [999648339]. [15-1187] Kim Watterson
09/03/2015	53	BRIEF by Appellants Ian Matthew Glover, Ricky Henson, Paulette House and Karen Pacouloute in electronic and paper format. Type of Brief: REPLY. Method of Filing Paper Copies: mail. [999654120] [15-1187] Cory Zajdel
10/01/2015	56	SUPPLEMENTAL AUTHORITIES (FRAP 28(j)) by Appellants Ian Matthew Glover, Ricky Henson, Paulette House and Karen Pacouloute. [999670906]. [15-1187] Cory Zajdel
10/27/2015	60	SUPPLEMENTAL AUTHORITIES (FRAP 28(j)) by Appellee Santander Consumer USA, Incorporated. [999687332]. [15-1187] Kim

		Watterson
12/09/15	61	ORAL ARGUMENT heard before the Honorable Paul V. Niemeyer, Allyson K. Duncan and G. Steven Agee. Attorneys arguing case: Mr. Cory Lev Zajdel for Appellants Ricky Henson, Ian Matthew Glover, Karen Pacouloute and Paulette House and Kim M. Watterson for Appellee Santander Consumer USA, Incorporated. Courtroom Deputy: Cathy Eagles. [999715567] [15-1187] (CWE)
03/23/2016	62	PUBLISHED AUTHORED OPINION filed. Originating case number: 1:12-cv-03519-RDB. [999780260]. Annotation added to opinion reflecting Supreme Court history--[Edited 02/02/2017 by SJC]. [15-1187] (DL)
03/23/2016	63	JUDGMENT ORDER filed. Disposition method: 15-1187 opn.p.arg. Decision: Affirmed. Originating case number: 1:12-cv-03519-RDB. Entered on Docket Date: 03/23/2016. [999780264] Copies to all parties and the district court/agency.. [15-1187] (DL)
04/06/2016	64	PETITION for rehearing en banc (FRAP 35) by Appellants

		Ian Matthew Glover, Ricky Henson, Paulette House and Karen Pacouloute. [15-1187] Cory Zajdel
04/19/2016	66	COURT ORDER filed [999798546] denying Motion for rehearing en banc [64] Copies to all parties.. [15-1187] (DL)
01/17/2017	72	SUPREME COURT REMARK--petition for writ of certiorari granted. 01/13/2017 [15-1187] (SJC)

APPENDIX B

Relevant District Court Docket Entries

Date Filed	#	Docket Text
11/29/2012	1	COMPLAINT against Commercial Recovery Systems, Inc., NCB Management Services, Incorporated, Santander Consumer USA, Inc. (Filing fee $ 350 receipt number 0416-3819330.), filed by Paulette House, Ricky Henson, Ian Matthew Glover, Karen Pacouloute. (Attachments: # 1 Civil Cover Sheet, # 2 Summons for Santander Consumer USA, # 3 Summons for NCB Management Services, # 4 Summons for Commercial Recovery Systems)(Zajdel, Cory) (Entered: 11/29/2012)
03/04/2013	8	MOTION to Dismiss Complaint by Santander Consumer USA, Inc. Responses due by 3/21/2013 (Fowler, Stephen) (Entered: 03/04/2013)
03/04/2013	9	Memorandum re 8 MOTION to Dismiss Complaint filed by Santander Consumer USA, Inc.. (Attachments: # 1 Exhibit Exh. A)(Fowler, Stephen) (Entered: 03/04/2013)
03/04/2013	10	MOTION to Dismiss by

		Commercial Recovery Systems, Inc., NCB Management Services, Incorporated Responses due by 3/21/2013 (Fowler, Stephen) (Entered: 03/04/2013)
03/04/2013	11	Memorandum re 10 MOTION to Dismiss filed by Commercial Recovery Systems, Inc., NCB Management Services, Incorporated. (Fowler, Stephen) (Entered: 03/04/2013)
04/04/2013	15	RESPONSE in Opposition re 8 MOTION to Dismiss Complaint filed by Ian Matthew Glover, Ricky Henson, Paulette House, Karen Pacouloute. Replies due by 4/22/2013. (Zajdel, Cory) (Entered: 04/04/2013)
04/04/2013	16	RESPONSE in Opposition re 10 MOTION to Dismiss filed by Ian Matthew Glover, Ricky Henson, Paulette House, Karen Pacouloute. Replies due by 4/22/2013. (Zajdel, Cory) (Entered: 04/04/2013)
04/24/2013	17	REPLY to Response to Motion re 8 MOTION to Dismiss Complaint filed by Santander Consumer USA, Inc.. (Fowler, Stephen) (Entered: 04/24/2013)
04/24/2013	18	REPLY to Response to Motion re 10 MOTION to Dismiss filed by Commercial Recovery

		Systems, Inc., NCB Management Services, Incorporated. (Fowler, Stephen) (Entered: 04/24/2013)
05/09/2013	21	Supplemental to 18 Reply to Response to Motion filed by Commercial Recovery Systems, Inc., NCB Management Services, Incorporated . (Fowler, Stephen) (Entered: 05/09/2013)
12/03/2013	23	SUGGESTION OF BANKRUPTCY Upon the Record and Notice of Automatic Stay by Commercial Recovery Systems, Inc., NCB Management Services, Incorporated, Santander Consumer USA, Inc.. (Attachments: # 1 Exhibit Exh. A, # 2 Exhibit Exh. B)(Fowler, Stephen) (Entered: 12/03/2013)
05/06/2014	24	MEMORANDUM OPINION. Signed by Judge Richard D Bennett on 5/6/14. (apls, Deputy Clerk) (Entered: 05/06/2014)
05/06/2014	25	ORDER granting 8 Santanders Motion to Dismiss; granting in part 10 NCB and CRSs Motion to Dismiss; staying 10 NCB and CRSs Motion to Dismissas to CRS bankruptcy proceedings; and ADMINISTRATIVELY CLOSING this case. Signed by Judge Richard D Bennett on

		5/6/14. (apls, Deputy Clerk) (Entered: 05/06/2014)
05/09/2014	26	MOTION for Reconsideration re 25 Order on Motion to Dismiss,,, 24 Memorandum Opinion by Ricky Henson Responses due by 5/27/2014 (Zajdel, Cory) (Entered: 05/09/2014)
05/09/2014	27	MOTION for Entry of Judgment under Rule 54(b) by Ian Matthew Glover, Ricky Henson, Paulette House, Karen Pacouloute Responses due by 5/27/2014 (Zajdel, Cory) (Entered: 05/09/2014)
05/27/2014	28	RESPONSE in Opposition re 26 MOTION for Reconsideration re 25 Order on Motion to Dismiss,,, 24 Memorandum Opinion filed by NCB Management Services, Incorporated. Replies due by 6/13/2014. (Fowler, Stephen) (Entered: 05/27/2014)
05/27/2014	29	RESPONSE in Opposition re 27 MOTION for Entry of Judgment under Rule 54(b) filed by NCB Management Services, Incorporated, Santander Consumer USA, Inc.. Replies due by 6/13/2014. (Fowler, Stephen) (Entered: 05/27/2014)
06/11/2014	30	REPLY to Response to Motion re 27 MOTION for Entry of Judgment under Rule 54(b) filed

		by Ian Matthew Glover, Ricky Henson, Paulette House, Karen Pacouloute. (Zajdel, Cory) (Entered: 06/11/2014)
06/12/2014	31	REPLY to Response to Motion re 26 MOTION for Reconsideration re 25 Order on Motion to Dismiss,,, 24 Memorandum Opinion filed by Ricky Henson. (Attachments: # 1 Exhibit Thomas v. CitiFinancial Auto Credit, Inc., Case No. 1:10-cv-528-JKB (ECF #64), # 2 Exhibit Bartlett v. Portfolio Recovery Assoc.)(Zajdel, Cory) (Entered: 06/12/2014)
01/13/2015	32	Supplemental to 26 MOTION for Reconsideration re 25 Order on Motion to Dismiss,,, 24 Memorandum Opinion filed by Ricky Henson . (Attachments: # 1 Exhibit Powell v. Palisades Acquisition XVI)(Zajdel, Cory) (Entered: 01/13/2015)
02/02/2015	33	MEMORANDUM OPINION. Signed by Judge Richard D Bennett on 2/2/2015. (ca2s, Deputy Clerk) (Entered: 02/03/2015)
02/02/2015	34	ORDER denying 26 Motion for Reconsideration ; granting 27 Motion for Entry of Judgment under Rule 54(b). Signed by

		Judge Richard D Bennett on 2/2/2015. (ca2s, Deputy Clerk) (Entered: 02/03/2015)
02/20/2015	35	NOTICE OF APPEAL as to 34 Order on Motion for Reconsideration, Order on Motion for Entry of Judgment under Rule 54(b), 25 Order on Motion to Dismiss,by Ian Matthew Glover, Ricky Henson, Paulette House, Karen Pacouloute. Filing fee $ 505, receipt number 0416-5232635. (Zajdel, Cory) Modified on 2/23/2015 (slss, Deputy Clerk). (Entered: 02/20/2015)
03/23/2016	39	JUDGMENT of USCA Affirming the judgment of the district court as to 35 Notice of Appeal, filed by Ian Matthew Glover, Paulette House, Ricky Henson, Karen Pacouloute (nd2s, Deputy Clerk) (Entered: 03/23/2016)
04/06/2016	40	STAY OF MANDATE of USCA UNDER FED. R. APP. P. 41(d)(1) as to 35 Notice of Appeal, filed by Ian Matthew Glover, Paulette House, Ricky Henson, Karen Pacouloute (nd2s, Deputy Clerk) (Entered: 04/07/2016)
04/19/2016	41	ORDER of USCA denying petition for rehearing en banc as

		to 35 Notice of Appeal, filed by Ian Matthew Glover, Paulette House, Ricky Henson, Karen Pacouloute (nd2s, Deputy Clerk) (Entered: 04/19/2016)
04/27/2016	42	MANDATE of USCA as to 35 Notice of Appeal. (bmhs, Deputy Clerk) (Entered: 04/27/2016)
01/17/2017	46	Petition for Writ of Certiorari Granted on 1/13/17(kw2s, Deputy Clerk) (Entered: 02/06/2017)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

RICKY HENSON
7583 WESTFIELD
ROAD, APT. I
BALTIMORE, MD 21222
(BALTIMORE CITY)

IAN MATTHEW
GLOVER
1001 HAMILTON
AVENUE
CLIFTON FORGE, VA
24422-1609

KAREN PACOULOUTE
F/K/A KAREN
WELCOME KUTEYI
316 WATCHUNG
AVENUE
ORANGE, NJ 07050

PAULETTE HOUSE
3600 ELY PLACE, S.E.
230 WASHINGTON, DC
20019-3037
on her own behalf and on
behalf of

all others similarly situated,

Plaintiffs,

v.

SANTANDER CONSUMER USA INC.
565 FIFTH AVENUE
NEW YORK, NY 10017

NCB MANAGEMENT SERVICES, INC.
3 NESHAMINY INTERPLEX-STE 205
TREVOSE, PA 19053

COMMERCIAL RECOVERY SYSTEMS, INC.
8035 EAST R.L. THORNTON, STE. 220
DALLAS, TX 75228

Serve All On: The Corporation Trust Incorporated
351 West Camden Street
Baltimore, MD 21201

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Case No.

COMPLAINT

Named Plaintiffs Ricky Henson, Ian Matthew Glover, Karen Pacouloute and Paulette House (collectively "Named Plaintiffs"), on their own behalf and on behalf of all others similarly situated, through their attorney Cory L. Zajdel of Z LAW, LLC, hereby submits this Class Action Complaint against Santander Consumer USA Inc. ("Santander"), NCB Management Services, Inc. ("NCB") and Commercial Recovery Systems, Inc. ("Commercial Recovery"), and states:

I. INTRODUCTION

1. This Complaint is filed and these proceedings are instituted under the "Fair Debt Collection Practices Act" 15 U.S.C. § 1692 *et. seq.*, (hereinafter "FDCPA") to recover actual and statutory damages, reasonable attorney's fees and costs of suit due to Defendants' violations all of which occurred within one year from the filing date of this Complaint.

2. The United States Congress has found there is abundant evidence of abusive, deceptive, and unfair debt collection practices by many debt collectors, and has determined that abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy. Congress drafted the FDCPA with the goal to eliminate abusive collection practices utilized by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively

disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

3. Defendants are debt collectors actively participating in collecting debts from consumers located in Maryland and around the country.

4. Defendant Santander is an entity that acts as a consumer finance company and acquires defaulted consumer debt that is bought for a few cents on the dollar.

5. Defendant Santander is a debt collector and attempts to collect the purchased defaulted debts directly from consumers.

6. Defendant NCB is a debt collector hired by Santander to attempt to collect defaulted debts from consumers on behalf of Santander.

7. Defendant Commercial Recovery is a debt collector hired by Santander to attempt to collect defaulted debts from consumers on behalf of Santander.

8. Defendants attempt to collect debts from consumers in Maryland and throughout the United States by mail and by telephone.

9. Defendants conduct business in Maryland by attempting to collect on consumer debts by contacting Maryland consumers.

10. Defendant Santander regularly communicates with Class Members unlawfully by: (a) communicating with consumers that are represented by an attorney regarding the alleged debt; (b) misrepresenting the amount of the alleged debt; (c) misrepresenting an entitlement to collect the alleged debt; and (d) referring Class Member accounts to Defendants NCB and Commercial Recovery for collection. Santander is also vicariously liable for the collection activities of Defendants NCB and Commercial Recovery.

11. Defendant NCB regularly communicates with Class Members unlawfully by: (a) communicating with consumers that are represented by an attorney regarding the alleged debt; (b) misrepresenting the amount of the alleged debt; (c) misrepresenting an entitlement to collect the alleged debt; and (d) misrepresenting the identity of the debt owner.

12. Defendant Commercial Recovery regularly communicates with Class Members unlawfully by: (a) communicating with consumers that are represented by an attorney regarding the alleged debt; (b) misrepresenting the amount of the alleged debt; (c) misrepresenting an entitlement to collect the alleged debt; (d) misrepresenting the identity of the debt owner; and (e) misrepresenting its ability to pursue further legal action on the alleged debt.

13. The communications from Defendants to Named Plaintiffs and the Class were generally contradictory, inaccurate and misleading.

14. Named Plaintiffs institute this class action against Defendants on their own behalf and on behalf of all others similarly situated for violations of statutory obligations and seek to recover actual damages, statutory damages, interest, attorney fees, and the costs of this action against Defendants for multiple violations of the FDCPA.

II. PARTIES

15. Named Plaintiff Ricky Henson is a natural person currently residing at 7583 Westfield Road, Apt. I, Baltimore, Maryland 21222 (Baltimore City) and is a "consumer" as that term is defined by 15 U.S.C. § 1692a(3).

16. Named Plaintiff Ian Matthew Glover is a natural person currently residing at 1001 Hamilton Avenue, Clifton Forge, VA 24422-1609 and is a "consumer" as that term is defined by 15 U.S.C. § 1692a(3).

17. Named Plaintiff Karen Pacouloute f/k/a Karen Welcome Kuteyi is a natural person currently residing at 316 Watchung Avenue, Orange, NJ 07050 and is a "consumer" as that term is defined by 15 U.S.C. § 1692a(3).

18. Named Plaintiff Paulette House is a natural person currently residing at 3600 Ely Place, S.E. 230, Washington, DC 20019 and is a "consumer" as that term is defined by 15 U.S.C. § 1692a(3).

19. Defendant Santander Consumer USA Inc. is a corporation formed under the laws of the state of

Illinois with a business address of 565 Fifth Avenue, New York, NY 10017.

20. At all times relevant to this Complaint, Santander transacted business in the District of Maryland and at other locations throughout Maryland, operating as a consumer finance company and "debt collector" as that term is defined by 15 U.S.C. § 1692a(6).

21. Defendant NCB Management Services, Inc. is a corporation formed under the laws of the state of Pennsylvania with a business address of 3 Neshaminy Interplex-Ste. 205, Trevose, PA 19053.

22. At all times relevant to this Complaint, NCB transacted business in the District of Maryland and at other locations throughout Maryland, operating as a collection agency and "debt collector" as that term is defined by 15 U.S.C. § 1692a(6).

23. Defendant Commercial Recovery Systems, Inc. is a corporation formed under the laws of the state of Texas with a business address of 8035 East R.L. Thornton, Ste. 220, Dallas, TX 75228.

24. At all times relevant to this Complaint, Commercial Recovery transacted business in the District of Maryland and at other locations throughout Maryland, operating as a collection agency and "debt collector" as that term is defined by 15 U.S.C. § 1692a(6).

III. JURISDICTION AND VENUE

25. Jurisdiction of this Court arises under 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331.

26. Venue is proper in this Court because Defendants transact business within this District, the conduct complained of occurred in the District, the Class Member transactions at issue were previously litigated in this District, the Court maintains jurisdiction over those claims, Named Plaintiff Henson resides in this District and all of the Defendants are residents of different Districts.

IV. FACTUAL ALLEGATIONS

Consumer Credit Contracts with CitiFinancial Auto

27. Named Plaintiffs applied for and were approved for subprime consumer credit from CitiFinancial Auto Credit, Inc., CitiFinancial Auto Corp. or CitiFinancial Auto, LTD ("CitiFinancial Auto").

28. Named Plaintiffs each financed the purchase a motor vehicle in the state of Maryland with the credit extended by CitiFinancial Auto which was a financial obligation and consumer debt that was primarily for personal, family or household purposes and is therefore a "debt" as that term is defined by 15 U.S.C § 1692a(5).

29. As a result of the transaction, each Named Plaintiff became the owner of a motor vehicle and

CitiFinancial Auto acquired a lien and security interest each Named Plaintiff's motor vehicle.

30. Named Plaintiffs' credit transactions were memorialized in Retail Installment Sale Contracts ("RISC").

31. The RISCs affirmatively elect to be governed under Subtitle 10 of Title 12 of the Commercial Law Article (*i.e.* Maryland's Credit Grantor Closed End Credit Provisions – hereafter "CLEC").

32. As some point in time, each Named Plaintiffs were unable to meet their payment obligations and defaulted under the RISC.

33. CitiFinancial Auto and/or its agents seized and repossessed the secured motor vehicles from Named Plaintiffs.

34. Named Plaintiffs did not receive any pre-repossession notices by registered or certified mail at least ten (10) days before the repossession.

35. CitiFinancial Auto wrote to Named Plaintiffs prior to the repossession sale demanding money and telling Named Plaintiffs that the motor vehicles would be sold unless they redeemed their RISCs.

36. CitiFinancial Auto then wrote to Named Plaintiffs and required accelerated and full payment of the outstanding balance on the RISC, stating the time and place the repossessed vehicles would be sold and that the sales would be public sales.

37. CitiFinancial Auto again wrote to Named Plaintiffs notifying them that the motor vehicles were sold, providing Named Plaintiffs with a partial accounting and telling Named Plaintiffs that a deficiency balance exists on their accounts.

Class Action Lawsuit and Settlement With CitiFinancial Auto

38. A class action lawsuit was filed against CitiFinancial Auto alleging that CitiFinancial Auto violated rights provided to consumers with respect to motor vehicle repossession under CLEC.

39. The litigation filed against CitiFinancial Auto proceeded in the United States District Court for the District of Maryland under case caption *Thomas v. CitiFinancial Auto Credit, Inc.*, 1:10-cv-00528-JKB ("Thomas Action").

40. The parties in the Thomas Action entered into a class-wide settlement agreement signed on September 30, 2011.

41. CitiFinancial Auto agreed to "waive any Deficiency Balance for all Settlement Class Members who do not opt out."

42. This Court entered an order preliminarily approving the settlement and appointing class counsel to represent all the Thomas Action class members with respect to the CitiFinancial Auto accounts on November 14, 2011.

43. Named Plaintiffs were all members of the class in the Thomas Action.

44. On May 29, 2012, this Court entered an order after holding a fairness hearing finally approving the class action settlement in the Thomas Action.

45. Thomas Action class members broadly released all claims against CitiFinancial Auto relating to the credit accounts resulting in a repossession sale.

46. Specifically excluded from the broad release in the Thomas Action was "any claims of Settlement Class Members that may be asserted against Santander Consumer USA Inc. or any of its related entities, or any person or entities collecting on their behalf, arising from efforts to collect on Settlement Class Members' accounts on or after December 1, 2011. This clarification shall not in any way limit the scope of the foregoing releases as to CitiFinancial or, except as stated in this paragraph 8(d), any other Released Parties or Released Claims."

Defendant Santander's Efforts to Collect From Named Plaintiffs After the Class was Certified and Class Counsel was Appointed by the District Court

47. Subsequent to Named Plaintiffs and all Thomas Action class members defaulting on each RISC, Defendant Santander was hired by CitiFinancial Auto as a servicer to collect on Named Plaintiffs and all other Thomas Action class member defaulted accounts.

48. On information and belief, no later than December 1, 2011, Defendant Santander purchased the delinquent Thomas Action class member accounts.

49. On information and belief, prior to December 1, 2011, Defendant Santander had knowledge that the Thomas Action class member accounts were the subject of a class action lawsuit and settlement.

50. On information and belief, prior to December 1, 2011, Defendant Santander had knowledge that this Court entered an order preliminarily approving the Thomas Action class-wide settlement and appointing class counsel to represent all Thomas Action class members.

51. On information and belief, Defendant Santander was not provided any contractual authority to collect from Thomas Action class members on or after December 1, 2011.

52. Beginning on or around December 1, 2011, Defendant Santander through its employees began communicating with Named Plaintiffs and other Thomas Action class members in writing through the United States mails and by telephone in an attempt to collect on the alleged debts.

53. For instance, on December 23, 2011 Defendant Santander placed a telephone call to Named Plaintiff House in an effort to collect on House's CitiFinancial Auto alleged debt that was part of the Thomas Action settlement.

54. Defendant Santander confirmed the telephone conversation with Named Plaintiff House with a letter mailed to House on December 27, 2011.

55. In communicating with Named Plaintiff House after December 1, 2011, Defendant Santander misrepresented: (a) the amount of the alleged debt; and (b) that it was entitled to collect on the alleged debt.

56. Defendant Santander also communicated with Named Plaintiff House at a time in which House was represented by an attorney with respect to the CitiFinancial Auto alleged debt.

57. Due to Defendant Santander's misrepresentations and unfair debt collection practices, Named Plaintiff House was induced to make multiple payments to Santander on the alleged debt.

Defendant NCB's Efforts to Collect From Named Plaintiffs Henson and Glover After the Class was Certified and Class Counsel was Appointed by the District Court

58. Subsequent to Named Plaintiffs and all Thomas Action class members defaulting on each RISC, Defendant Santander's purchase of the Thomas Action class member delinquent accounts and appointment of class counsel, Santander hired NCB to collect from Thomas Action class members.

59. Beginning on or around December 1, 2011, Defendant NCB through its employees began

communicating with Thomas Action class members in writing through the United States mails and by telephone in an attempt to collect on the alleged debts.

60. For instance, on December 29, 2011, Defendant NCB mailed a letter to Named Plaintiff Henson in an effort to collect on Henson's CitiFinancial Auto alleged debt that was part of the Thomas Action settlement.

61. The letter mailed to Named Plaintiff Henson stated that NCB was collecting on behalf of CitiFinancial Auto.

62. The letter mailed to Named Plaintiff Henson stated that the balance on the CitiFinancial Auto alleged debt was $26,088.50.

63. In December 2011, Named Plaintiff Glover called Defendant Santander to determine the status of his CitiFinancial Auto credit account.

64. Defendant Santander directed Named Plaintiff Glover to Defendant NCB.

65. Named Plaintiff called Defendant NCB and inquired into the status of the CitiFinancial Auto alleged debt.

66. NCB represented that an amount was due and owing to Defendant Santander and requested that Named Plaintiff Glover begin making payments on the alleged debt.

67. In communicating with Named Plaintiffs Henson and Glover after December 1, 2011, Defendant NCB misrepresented: (a) the amount of the alleged debts; (b) that it was entitled to collect on the alleged debts; and (c) the identity of the debt owner.

68. Defendant NCB also communicated with Named Plaintiffs Henson and Glover at a time in which Henson and Glover were represented by an attorney with respect to the CitiFinancial Auto alleged debt.

69. Due to Defendant NCB's misrepresentations and unfair debt collection practices, Named Plaintiff House was induced to make payments to NCB on the alleged debt.

Defendant Commercial Recovery's Efforts to Collect From Named Plaintiff Pacouloute After the Class was Certified and Class Counsel was Appointed by the District Court

70. Subsequent to Named Plaintiffs and all Thomas Action class members defaulting on each RISC, Defendant Santander's purchase of the Thomas Action class member delinquent accounts and appointment of class counsel, Santander hired Commercial Recovery to collect from Thomas Action class members.

71. Beginning on or around December 1, 2011, Defendant Commercial Recovery through its employees began communicating with Thomas Action class members in writing through the United States

mails and by telephone in an attempt to collect on the alleged debts.

72. For instance, on January 26, 2012, Defendant Commercial Recovery mailed a letter to Named Plaintiff Pacouloute in an effort to collect on Pacouloute's CitiFinancial Auto alleged debt that was part of the Thomas Action settlement.

73. The letter mailed to Named Plaintiff Pacouloute stated that Commercial Recovery was collecting on behalf of CitiFinancial Auto.

74. The letter mailed to Named Plaintiff Pacouloute stated that the balance on the CitiFinancial Auto alleged debt was $28,608.11.

75. In communicating with Named Plaintiff Pacouloute after December 1, 2011, Defendant Commercial Recovery misrepresented: (a) the amount of the alleged debt; (b) that it was entitled to collect on the alleged debt; and (c) the identity of the debt owner.

76. Defendant Commercial Recovery also communicated with Named Plaintiff Pacouloute at a time in which Pacouloute was represented by an attorney with respect to the CitiFinancial Auto alleged debt.

77. While attempting to collect the alleged debts from Named Plaintiffs and all Thomas Action class members after December 1, 2011, Defendants acted in an abusive, harassing and deceptive manner contrary to the standards of civilized society and the

standards employed by others in its industry and in violation of 15 U.S.C. §§ 1692(b); 1962c, 1962c(b),1692d, 1692e, 1692e(2), 1692e(5), 1692e(10), 1692e(11), 1692f and 1692g(a) amongst others.

78. As a direct and proximate result of Defendants' illegal collection tactics and harassing behavior, Named Plaintiffs and the Class they seek to represent have sustained actual damages in the form of payments made to Defendants in reliance upon the misrepresentations.

V. CLASS ACTION ALLEGATIONS

79. Named Plaintiffs bring this action on behalf of a Class which consists of:

> **All Thomas Action class members who were subjected to debt collection efforts by Santander Consumer USA Inc. on or after December 1, 2011.**
>
> *NCB Subclass*
>
> **All Thomas Action class members who were subjected to debt collection efforts by NCB on or after December 1, 2011.**
>
> *Commercial Recovery Subclass*
>
> **All Thomas Action class members who were subjected to debt collection efforts by Commercial Recovery on or after December 1, 2011.**

Excluded from the Class are those individuals who now are or have ever been executives of the Defendants and the spouses, parents, siblings and children of all such individuals.

80. The Class and Subclasses, as defined above, are identifiable.

81. Named Plaintiffs are all members of the Class.

82. Named Plaintiffs Henson and Glover are each members of the NCB Subclass.

83. Named Plaintiff Pacouloute is a member of the Commercial Recovery Subclass.

84. The Class consists, at a minimum of more than one hundred Thomas Action class members who defaulted on a loan with CitiFinancial Auto and was subjected to collection efforts by Santander, NCB and/or Commercial Recovery on or after December 1, 2011 and is thus so numerous that joinder of all members is clearly impracticable. Fed. R. Civ. P. 23(a)(1).

85. There are questions of law and fact which are not only common to the Class but which predominate over any questions affecting only individual class members. Fed. R. Civ. P. 23(a)(2).

86. The common and predominating questions include, but are not limited to:

(a) Whether Defendant Santander had the contractual authority on or after December 1, 2011 to

collect any amounts from Thomas Action class members;

(b) Whether it is a violation of the FDCPA to attempt to collect an alleged debt to which the debt collector has no contractual or legal right to collect;

(c) Whether Defendant Santander had knowledge on or before December 1,

2011 that Thomas Action class members were represented by counsel;

(d) Whether it is a violation of the FDCPA to attempt to collect an alleged debt from a consumer known to be represented by counsel;

(e) Whether Defendants misrepresented the amount of the CitiFinancial Auto alleged debts to the Class;

(f) Whether it is a violation of the FDCPA to misrepresent the amount of the CitiFinancial Auto alleged debts to the Class;

(g) Whether Defendants misrepresented the identity of the debt owner;

(h) Whether it is a violation of the FDCPA to misrepresent the identity of the debt owner;

(i) Whether Defendant NCB acted as an agent of Defendant Santander for the purpose of collecting on the CitiFinancial Auto alleged debts included in the Thomas Action;

(j) Whether Defendant Commercial Recovery acted as an agent of Defendant Santander for the purpose of collecting on the CitiFinancial Auto alleged debts included in the Thomas Action;

(k) Whether Defendant Santander is vicariously liable for the acts of Defendant NCB and Commercial Recovery in attempting to collect on the CitiFinancial Auto alleged debts.

87. Claims of Named Plaintiffs are typical of the claims of the respective members of the Class within the meaning of Fed. R. Civ. P. 23(a)(3), and are based on and arise out of similar facts constituting the wrongful conduct of Defendants.

88. Named Plaintiffs will fairly and adequately protect the interests of the Class within the meaning of Fed. R. Civ. P. 23(a)(4).

89. Named Plaintiffs are committed to vigorously litigating this matter.

90. Further, Named Plaintiffs have secured counsel experienced in handling consumer class actions and complex consumer litigation.

91. Neither Named Plaintiffs nor their counsel have any interests which might cause them not to vigorously pursue this claim.

92. Common questions of law and fact enumerated above predominate over questions affecting only individual members of the Class. Fed. R. Civ. P. 23(b)(3).

93. A class action is the superior method for fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3).

94. The likelihood that individual members of the Class will prosecute separate actions is remote due to the time and expense necessary to conduct such litigation.

95. Named Plaintiffs' counsel is experienced in class actions and foresees little difficulty in the management of this case as a class action.

V. CAUSES OF ACTION

COUNT I

(FAIR DEBT COLLECTION PRACTICES ACT)

96. Named Plaintiffs incorporate by reference all of the allegations of this Complaint as though fully stated herein.

97. While attempting to collect the alleged debts from Named Plaintiffs, the Class and the Subclasses, Defendants acted in an abusive, harassing and deceptive manner contrary to the standards of civilized society and the standards employed by others in its industry and in violation of numerous provisions of the FDCPA.

98. FDCPA violations include, but are not limited to: 15 U.S.C. §§ 15 U.S.C. §§ 1692(b); 1962c, 1962c(b),1692d, 1692e, 1692e(2), 1692e(5), 1692e(10), 1692e(11), 1692f and 1692g(a) amongst others.

99. As a direct and proximate result of Defendants' illegal collection tactics and harassing behavior in violation of the FDCPA, Named Plaintiffs, the Class and Subclasses have sustained actual damages in the form of payments made to Defendants in reliance upon the misrepresentations.

WHEREFORE, Named Plaintiffs pray that judgment be entered against Defendants:

- Certifying the Class, the NCB Subclass and Commercial Recovery Subclass under Rule 23(b)(3).
- For an order declaring that the Defendants' actions as described above are in violation of the FDCPA;
- for an award of actual and compensatory damages pursuant to 15 U.S.C. § 1692k against Defendants;
- for an award of statutory damages pursuant to 15 U.S.C. § 1692k against each Defendant not to exceed $500,000 per Defendant;
- for an award of costs of litigation and reasonable attorney's fees pursuant to 15 U.S.C. § 1692k against each Defendant;
- Award pre and post judgment interest; and

- Award such other relief this Court deems just and equitable.

Dated: November 29, 2012

Respectfully submitted,

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/s/ 28191

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JURY TRIAL

Named Plaintiffs Henson, Glover, Pacouloute and House demand trial by jury.

/s/ 28191
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RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

RICKY HENSON, IAN MATTHEW GLOVER, KAREN PACOULOUTE, F/K/A KAREN WELCOME KUTEYI, AND PAULETTE HOUSE,

Petitioners,

v.

SANTANDER CONSUMER USA, INC.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF OF PETITIONERS

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QUESTION PRESENTED

Whether a company that regularly attempts to collect debts it purchased after the debts had fallen into default is a "debt collector" subject to the Fair Debt Collection Practices Act?

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Davidson v. Capital One Bank (USA), N.A.,
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Fed. Trade Comm'n v. Check Inv'rs, Inc.,
502 F.3d 159 (3d Cir. 2007) 12, 37, 38

Friedman v. Textron Fin. Corp.,
No. 96 C 7983, 1997 WL 467175 (N.D. Ill.
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Glazer v. Chase Home Fin. LLC,
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Heintz v. Jenkins,
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Hoen v. FCC Finance, LLC,
126 F. Supp. 3d 472 (D.N.J. 2015) 51

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA,
559 U.S. 573 (2010) 29

Miller v. BAC Home Loans Servicing, L.P.,
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Ohio v. Robinette,
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Perry v. Stewart Title Co.,
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Ruth v. Triumph P'ships,
577 F.3d 790 (7th Cir. 2009) 12

Schlegel v. Wells Fargo Bank, N.A.,
720 F.3d 1204 (9th Cir. 2013) 12

Schlosser v. Fairbanks Capital Corp.,
323 F.3d 534 (7th Cir. 2003) 12

Schroyer v. Frankel,
197 F.3d 1170 (6th Cir. 1999) 55

Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.,
554 U.S. 269 (2008) 28

Thomas v. CitiFinancial Auto Credit, Inc.,
No. 1:10-cv-00528-JKB (D. Md.) 14

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11 U.S.C. § 523 45

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Fair Debt Collection Practices Act,
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Dodd-Frank Wall Street Reform And Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010) 13

Financial Services Regulatory Relief Act of 2006, Pub. L. 109-351, 120 Stat. 1966. 13

Other Authorities

Amicus Brief of the Federal Trade Commission Supporting Rehearing En Banc, *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309 (11th Cir. 2015) 13

CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts (July 10, 2013) 13

Consumer Fin. Prot. Bureau, Fair Debt Collection Practices Act: CFPB Annual Report 2014 (March 2014), http://files.consumerfinance.gov/f/201403_cfpb_fair-debt-collection-practices-act.pdf 8, 51

Consumer Fin. Prot. Bureau, Fair Debt Collection Practices Act: CFPB Annual Report 2016 (March 2016), http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf 8, 9, 10, 11

Mariya Deryugina, *V. Mortgage Loan Modification: Barriers To Use*, 28 REV. BANKING & FIN. L. 426 (2009) 6

Fed. Trade Comm'n, Collecting Consumer Debts: The Challenges of Change – A Workshop Report (Feb. 2009), https://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf ..... passim

Fed. Trade Comm'n, The Structure and Practices of the Debt Buying Industry (Jan. 2013), https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf ..... passim

Jake Halpern, *Paper Boys: Inside the Dark, Labyrinthine, and Extremely Lucrative World of Consumer Debt Collection*, N.Y. TIMES MAG. (Aug. 15, 2014), https://nyti.ms/2jRQHU6 40

H.R. Rep. No. 94-1202 (1976) 34

Hedge Fund Investing In Delinquent Mortgages, NBC NEWS, http://www.nbcnews.com/id/25939227/ns/business-real_estate/t/hedge-funds-investing-delinquent-mortgages/#.WKHv6G8rKn8 (last visited Feb. 16, 2017) 9

Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. LEGIS. 41 (2015) ..... passim

Rick Jurgens & Robert J. Hobbs, Nat'l Consumer Law Ctr., The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts (July 2010), *available at* https://www.nclc.org/images/pdf/debt_collection/debt-machine.pdf 39

Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action Against the Two Largest Debt Buyers for Using Deceptive Tactics to Collect Bad Debts (Sept. 9, 2015), *available at* http://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-the-two-largest-debt-buyers-for-using-deceptive-tactics-to-collect-bad-debts. 39

Press Release, Fed. Trade Comm'n, Debt Buyer/Debt Collection Companies and Their Principals Settle FTC Charges (Mar. 24, 2004), *available at* https://www.ftc.gov/news-events/press-releases/2004/03/debt-buyerdebt-collection-companies-and-their-principals-settle. 39

Press Release, Fed. Trade Comm'n, Debt Collector Settles with FTC for Abusive Practices (Mar. 12, 2007), *available at* https://www.ftc.gov/news-events/press-releases/2007/03/debt-collector-settles-ftc-abusive-practices. 39

RESTATEMENT (SECOND) OF CONTRACTS (AM. LAW. INST. 1981) 28, 48

S. Rep. No. 95-382 (1977) ..... passim

Santander Consumer USA Holdings Inc., Current Report (Form 8-K) (Jan. 25, 2017), *available at* http://d18rn0p25nwr6d.cloudfront.net/CIK-0001580608/fd109f3d-45be-43ef-a021-47a87d513351.pdf 56

Santander Consumer, Prospectus Supplement (filed pursuant to Rule 424(b)(3)) (Dec. 30, 2013), *available at* http://www.sec.gov/Archives/edgar/data/1383094/000119312514000794/d650648d424b3.htm 56

Senate Comm. on Banking, Housing & Urban Affairs, Markup Session: S. 1130 Debt Collection Legislation (June 30, 1977) 35, 53

Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M. L. REV. 327 (2014) 39

Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755 (2011) 7, 8

Thomas v. CitiFinancial Auto Credit, Inc., No. 1:10-cv-00528-JKB, Settlement Agreement, ECF 56-2 14

U.S. BIO, *Check Investors, Inc. v. FTC*, No. 08-37 ..... 12, 49

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U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-278, NONBANK MORTGAGE SERVICERS: EXISTING REGULATORY OVERSIGHT COULD BE STRENGTHENED (2016) 6, 7

MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/ for (last visited Feb. 16, 2017) 49

What We Do: Direct Private Investing, GOLDMAN SACHS, http://www.goldmansachs.com/what-we-do/investing-and-lending/direct-private-investing/ (last visited Feb. 16, 2017) 9

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BRIEF OF PETITIONERS

Petitioners Ricky Henson, Ian Matthew Glover, Karen Pacouloute, f/k/a Karen Welcome Kuteyi, and Paulette House respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is published at 817 F.3d 131. The opinion of the district court (Pet. App. 21a-40a) is unpublished but available at 2014 WL 1806915.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2016. Pet. App. 2a. The court of appeals denied petitioners' timely petition for rehearing en banc on April 19, 2016. Pet. App. 41a-42a. On July 5, 2016, the Chief Justice extended the time to file this petition through August 17, 2016. No. 16A12. On August 4, 2016, the Chief Justice further extended the time to file the petition in this case through September 16, 2016. *Id.* Petitioners filed a timely petition for a writ of certiorari on September 16, 2016. No. 16-349. This Court granted the petition on January 13, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant portions of Title 15 U.S.C. §§ 1692-1692p are appended in a statutory appendix to this brief.

STATEMENT OF THE CASE

Congress enacted the Fair Debt Collection Practices Act (FDCPA) in 1977 in light of "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). Congress specifically targeted "debt collectors" because, "[u]nlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." S. Rep. No. 95-382, at 2 (1977).

Respondent Santander Consumer USA, Inc. was hired as a "debt servicer" to collect money petitioners and other consumers owed on their automobiles to CitiFinancial Auto. Because it began servicing those loans after petitioners and thousands of other consumers defaulted on their debts, Santander qualified as a "debt collector" subject to the FDCPA. *See* 15 U.S.C. §§ 1692a(6), 1692a(6)(F)(iii). In December 2011, Santander purchased petitioners' debts from the original creditor as part of a larger debt purchase agreement. Santander knew that the originator had agreed to waive petitioners' debts as part of a settlement of other litigation that was pending final court approval. But Santander nonetheless persisted in attempting to collect from petitioners, securing partial payments from at least two of them.

As the case stands, there is no dispute that such conduct would violate the FDCPA if the statute continued to apply to Santander after the purchase. But the Fourth Circuit held that in buying the debts

it was previously hired to collect for CitiFinancial Auto, Santander exempted itself from the Act's coverage.

I. Statutory Background

A. The Statute

1. The FDCPA defines a covered "debt collector" through a three-stage process.

First, it initially defines "debt collector" to include two classes of persons and businesses, the second of which is most relevant to this case: (1) one whose "principal purpose" is "the collection of any debts"; and (2) one "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6).

Second, the statute then provides exceptions for certain people and debts. *See id.* § 1692a(6)(A)-(F). For example, the term "debt collector" "does not include . . . any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor." *Id.* § 1692a(6)(A). The definition also excludes:

> any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured

> party in a commercial credit transaction involving the creditor.

Id. § 1692a(6)(F).

The exemption for those who obtain debts prior to default finds a parallel in an exception to the definition of a "creditor," which is defined to include:

> any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

Id. § 1692a(4).

Third, the statute provides an exception to the Clause (F) exceptions:

> Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term ["debt collector"] includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.

Id. § 1692a(6).

2. Once a company is classified as a debt collector, it is subject to the FDCPA's substantive provisions, which apply to all of its collection efforts with respect to any debt unless that debt falls within a statutory exception. The statute provides, for example, that a debt collector

- generally "may not communicate with a consumer in connection with the collection of any debt . . . if the debt collector knows the consumer is represented by an attorney with respect to such debt," *id.* § 1692c(1)(2);
- "may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt," *id.* § 1692d;
- "may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt," *id.* § 1692e; and
- "may not use unfair or unconscionable means to collect or attempt to collect any debt," *id.* § 1692f.

3. The FDCPA may be enforced through civil actions by private persons, the Federal Trade Commission (FTC), or the Consumer Finance Protection Bureau (CFPB). *See id.* §§ 1692k, 1692*l*.

Defendants have a complete defense if they can show "by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *Id.* § 1692k(c). Any collector uncertain of its obligations can request an advisory opinion from the CFPB and is immune from liability for "any act done or omitted in good faith in conformity with" the opinion. *Id.* § 1692k(e).

Private plaintiffs may recover their actual damages and, in the discretion of the district court, statutory damages capped at $1,000 per case. *Id.*

§ 1692k(a). In class actions, statutory damages are limited to the lesser of $500,000 or one percent of the debt collector's net worth. *Id.* § 1692k(a)(2)(B).

B. Players In The Consumer Credit And Debt Collection Markets

In general, the FDCPA has potential application to four kinds of entities that collect consumer debt.

Loan Originators. Consumer debt is generally originated by banks, credit card issuers, and consumer finance companies. These lenders may collect on the debt themselves or they may hire outside servicers or debt collectors.[1]

Debt Servicers. Once a loan is originated, it must be "serviced." Servicing includes a variety of tasks when the loan is in good standing, including sending bills, responding to consumer inquiries, collecting payment and distributing the proceeds, administering escrow accounts for home loans, etc.[2] Originators often service their own loans, but they

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[1] *See* Fed. Trade Comm'n, Collecting Consumer Debts: The Challenges of Change – A Workshop Report ("*Challenges of Change*") 2-3 (Feb. 2009), https://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf.

[2] *See* 12 U.S.C. § 2605(i)(3); U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-278, NONBANK MORTGAGE SERVICERS: EXISTING REGULATORY OVERSIGHT COULD BE STRENGTHENED ("NONBANK MORTGAGE SERVICERS") 4-5 (2016); Mariya Deryugina, *V. Mortgage Loan Modification: Barriers To Use*, 28 REV. BANKING & FIN. L. 426, 426 (2009).

may also hire outside servicers.[3] Those servicers may be paid a flat fee, but they are often compensated on a contingency basis.[4]

A servicer may be hired before or after a debt has fallen into default.[5] Servicers may also be assigned the debt in order to facilitate collection.[6]

Third-Party Debt Collectors. A lender or its servicer may also hire a third-party to collect the debt, which is particularly common when other collection efforts have failed. Third-party debt collectors are generally paid a portion of whatever money they recover.[7]

Debt Buyers. As noted, a debt may be assigned to servicers to facilitate collection. But debts are also assigned as a way of selling the debt to investors.[8] Some loans (particularly home loans) are regularly sold shortly after origination. The loan originator

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[3] NONBANK MORTGAGE SERVICES, *supra* at 4-5.

[4] *Id.* at 17; Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755, 765-68 (2011).

[5] *See* Fed. Trade Comm'n, The Structure and Practices of the Debt Buying Industry ("*Structure and Practices*") 11 (Jan. 2013), https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

[6] *See* 15 U.S.C. § 1692a(4); *Challenges of Change, supra*, at 3, 23.

[7] *See Challenges of Change, supra*, at 3.

[8] *See* Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. LEGIS. 41, 52 (2015) ("*Dirty Debts*").

may continue to service the debt, or the purchaser may do so or hire a third-party servicer.[9]

Other debt (particularly credit card debt) is often sold after default.[10] As the CFPB has noted, the advent and growth of the market for defaulted debt "is one of the most significant changes to the debt collection market" since Congress enacted the FDCPA in late 1970s.[11] Members of this new debt buying industry "purchase defaulted debt from original creditors" for pennies on the dollar and then "seek to collect on purchased debts themselves."[12] In 2015, debt buyers reported approximately $4.4 billion in revenue.[13]

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[9] In the mortgage context, servicing rights may sold to a third-party that obtains the right to retain a percentage of the monthly payment in return for the servicing. *See Thompson*, *supra*, at 765-68. The underlying debt is frequently sold separately and securitized. *Id.* at 762-65.

[10] *See, e.g.*, Consumer Fin. Prot. Bureau, Fair Debt Collection Practices Act: CFPB Annual Report 2016 ("*CFPB 2016 Annual Report*") 10 (March 2016), http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf; *Challenges of Change*, *supra*, at 13; *Dirty Debts*, *supra*, at 52.

[11] Consumer Fin. Prot. Bureau, Fair Debt Collection Practices Act: CFPB Annual Report 2014 ("*CFPB 2014 Annual Report*") 7 (March 2014), http://files.consumerfinance.gov/f/201403_cfpb_fair-debt-collection-practices-act.pdf; *see also Structure and Practices*, *supra*, at ii.

[12] *CFPB 2014 Annual Report*, *supra*, at 7; *see also Structure and Practices*, *supra*, at ii (on average, debt buyers pay four cents per dollar of debt face value).

[13] *See CFPB 2016 Annual Report*, *supra*, at 9.

The industry has grown quickly and is constantly evolving. There are presently "hundreds, if not thousands, of entities of varying sizes that purchase debts."[14] Some companies focus almost exclusively on purchasing and collecting defaulted debts.[15] Others have included debt purchasing and collecting as part of a broader mix of financial ventures or investments. As this case illustrates, purchasing and attempting to collect debt is a natural extension of many consumer finance businesses that already service debts for others or originate and service their own loans. In addition, a number of hedge funds and investment companies have begun purchasing defaulted debt as part of a diversified investment strategy.[16]

Some of the most common complaints the Government receives about debt collection are that consumers are being dunned for debts of some other person, for debts they do not owe (*e.g.*, because they have been paid, discharged in bankruptcy, or are beyond the statute of limitations), or for debts in the wrong amount.[17] Particularly when defaulted debts

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[14] *See Structure and Practices*, *supra*, at 14.

[15] *See Challenges of Change*, *supra*, at 13.

[16] *See, e.g.*, *CFPB 2016 Annual Report*, *supra*, at 10-11; *Challenges of Change*, *supra*, at 12-14; *Hedge Fund Investing In Delinquent Mortgages*, NBC NEWS, http://www.nbcnews.com/id/25939227/ns/business-real_estate/t/hedge-funds-investing-delinquent-mortgages/#.WKHv6G8rKn8 (last visited Feb. 16, 2017); *What We Do: Direct Private Investing*, GOLDMAN SACHS, http://www.goldmansachs.com/what-we-do/investing-and-lending/direct-private-investing/ (last visited Feb. 16, 2017).

[17] *See Dirty Debts*, *supra*, at 75.

are sold and resold multiple times,[18] debt buyers can wind up with inaccurate information.[19] Debt buyers often purchase huge portfolios of debt, comprising thousands (sometimes hundreds of thousands) of accounts.[20] They frequently obtain relatively little information about the debt or the debtors – it is common for the debt buyer to receive just a spreadsheet listing only basic information about the debt and the consumer.[21] Debt buyers "rarely receive[] any information from sellers concerning whether a consumer had disputed the debt or whether the disputed debt had been verified."[22]

Debt sellers generally disclaim any warranty of the accuracy of the information they are providing the buyers.[23] Moreover, the vast majority of the time, debt sellers do not provide any supporting documents and, even if they are available after the sale, documents are rarely requested.[24] And even when

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[18] *Structure and Practices*, *supra*, at 19.

[19] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-748, CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES ACT COULD BETTER REFLECT THE EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 43-47 (2009); *CFPB 2016 Annual Report*, *supra*, at 10-11, 32.

[20] *See Dirty Debts*, *supra*, at 52.

[21] *See, e.g.*, *Structure and Practices*, *supra*, at ii-iii, 20-21; *Challenges of Change*, *supra*, at 22.

[22] *Structure and Practices*, *supra*, at ii.

[23] *See Structure and Practices*, *supra*, at iii; *Dirty Debts*, *supra*, at 61-63.

[24] *Structure and Practices*, *supra*, at iii, 35; *Dirty Debts*, *supra*, at 68-72.

they do provide underlying documentation, some sellers disclaim any warranty of its accuracy.[25]

Debt buyers may attempt to collect the debt themselves or hire third-party debt collectors.[26] These collection efforts are regularly undertaken on an industrial scale, using automated systems.[27] "Thousands of debt collection lawsuits are filed every day, most of them by debt buyers." *Dirty Debts*, *supra*, at 55; *see also Challenges of Change*, *supra*, at 55-57 (noting 60% of the 120,000 small claims suits filed in Massachusetts in 2005 were by debt collectors, while 119,000 debt collections suits were pending in Chicago courts as of June 2008).

C. History Of The FDCPA's Application To Assignees And Debt Purchasers

The FDCPA's "regularly collects" prong is easy enough to apply to loan originators and third-party collectors. Lenders that regularly collect only debts they originate are not attempting to collect debts "owed or due another," while third-party collectors clearly are. Applying the statutory language to assignees like debt buyers is more difficult.

On the one hand, one might think assignees are "owed" and "due" the debt within the meaning of the statute, so fall outside the definition. But that view immediately runs into the problem that Clause (F) provides an exception for those collecting a debt

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[25] *See Structure and Practices*, *supra*, at iii.

[26] *See, e.g.*, *CFPB 2016 Annual Report*, *supra*, at 8-9.

[27] *See, e.g.*, *Challenges of Change*, *supra*, at 14-21.

"owed or due another" if the collector obtained the debt before it fell into default – making clear Congress contemplated that it is possible for one to "obtain" a debt yet still be collecting a debt "owed or due another," and implying that someone (like a debt purchaser) who obtains a debt *after* it has fallen into default *is* a debt collector.

Until recently, the lower courts uniformly resolved these difficulties by holding that debt buyers are "debt collectors" to the extent they are collecting debt obtained while in default, but not when they are collecting debt obtained prior to default. *See, e.g.*, *Miller v. BAC Home Loans Servicing, L.P.*, 726 F.3d 717, 722 & n.5 (5th Cir. 2013); *Bridge v. Ocwen Fed. Bank, FSB*, 681 F.3d 355, 359-63 (6th Cir. 2012); *Ruth v. Triumph P'ships*, 577 F.3d 790, 796-97 (7th Cir. 2009); *Fed. Trade Comm'n v. Check Inv'rs, Inc.*, 502 F.3d 159, 172-74 (3d Cir. 2007); *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536-38 (7th Cir. 2003); *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985); *but see* Pet. App. 4a-5a; *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1311, 1314-16 (11th Cir. 2015); *Schlegel v. Wells Fargo Bank, N.A.*, 720 F.3d 1204, 1208 (9th Cir. 2013).

The federal government has taken the same view, across agencies and administrations. *See, e.g.*, U.S. BIO 12, *Check Investors, Inc. v. FTC*, No. 08-37 ("[The] statutory distinction between a 'creditor' and a 'debt collector' depends, in the case of a third party to whom a debt has been transferred or assigned,

solely upon whether the debt in question was in default at the time of the transfer or assignment.");[28] Amicus Brief of the Federal Trade Commission Supporting Rehearing En Banc at 9, *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309 (11th Cir. 2015) ("A company that regularly buys debts owed to others and collects them is a 'debt collector' under the FDCPA for debts that were in default at the time it acquired those debts.");[29] CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts 2 (July 10, 2013) ("The FDCPA generally applies to third-party debt collectors, such as collection agencies, debt purchasers, and attorneys who are regularly engaged in debt collection.").[30]

During the period of consensus, Congress amended the FDCPA without altering that understanding. *See* Dodd-Frank Wall Street Reform And Consumer Protection Act, Pub. L. 111-203, § 1089, 124 Stat. 1376, 2092 (2010); Financial Services Regulatory Relief Act of 2006, Pub. L. 109-351, § 802, 120 Stat. 1966, 2006.

II. Factual Background

Petitioners obtained car loans from CitiFinancial Auto. When they were unable to make the payments and defaulted, CitiFinancial Auto repossessed their cars, sold the vehicles, and informed petitioners they

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[28] *Available at* 2008 WL 4533650.

[29] *Available at* 2015 WL 5608572.

[30] *Available at* http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf.

owed a deficiency balance. Pet. App. 5a. CitiFinancial Auto hired respondent Santander Consumer USA Inc., as a servicer to collect the defaulted debts. J.A. 23 (Complaint ¶ 47).

CitiFinancial Auto's repossession practices were subsequently the subject of a class action lawsuit in which petitioners were class members. *See Thomas v. CitiFinancial Auto Credit, Inc.*, No. 1:10-cv-00528-JKB (D. Md.). The *Thomas* class action alleged that CitiFinancial Auto violated various provisions of Maryland consumer protection law, including by failing to provide adequate pre-repossession notices as required by the statute. Pet. App. 22a.

The *Thomas* parties agreed to a settlement on September 30, 2011. Pet. App. 23a & n.1. Under the settlement, CitiFinancial Auto agreed to waive more than $30 million in alleged deficiency balances for more than 3,000 class members. *See id.*; *Thomas v. CitiFinancial Auto Credit, Inc.*, No. 1:10-cv-00528-JKB, Settlement Agreement, ECF 56-2 at 3 ¶ 8. On November 14, 2011, the district court certified the class action, appointed class counsel, and preliminarily approved the settlement pending a fairness hearing. Pet. App. 23a n.1. The court gave final approval to the settlement on May 29, 2012. *Id.* 23a.

Around December 1, 2011, Santander purchased a portfolio of debts from CitiFinancial Auto, which included the defaulted debts of the *Thomas* class action plaintiffs that it had previously been hired to service. J.A. 17 (Complaint ¶ 10); Pet. App. 23a.

When it purchased the debts, Santander knew of the *Thomas* litigation and that CitiFinancial Auto

had agreed to extinguish petitioners' debts in a settlement that was simply awaiting final approval from the district court. J.A. 24 (Complaint ¶¶ 49-50). It also knew that petitioners were represented by court-appointed counsel with respect to their debts. *Id.* (Complaint ¶ 50). Santander nonetheless bypassed petitioners' court-appointed attorney and proceeded to communicate directly with petitioners in an attempt to collect the debts. *Id.* 24-25 (Complaint ¶¶ 52-57). Santander also hired third-party debt collectors, who likewise communicated directly with petitioners, demanding payment. *Id.* 25-28 (Complaint ¶¶ 58-77). These efforts induced more than one class member to make payments on the debts, despite the impending settlement waiving the deficiencies. *Id.* 25, 27 (Complaint ¶¶ 57, 69).

III. Procedural Background

1. On November 29, 2012, petitioners filed the present putative class action against respondent, alleging violations of the FDCPA. Among other things, petitioners alleged that Santander violated the statute by misrepresenting its authority to collect the debt and the amount of the debt allegedly owed, and by communicating directly with consumers it knew to be represented by counsel. *See* Pet. App. 5a, 23a-24a; J.A. 17, 25 (Complaint ¶¶ 10, 55-56).

Santander moved to dismiss, arguing that it did not qualify as a "debt collector" because it had purchased the defaulted debt it was seeking to collect. Pet. App. 6a. The district court agreed with Santander and dismissed. *Id.* Petitioners appealed.

2. The Fourth Circuit affirmed, explaining that "[w]hile the FDCPA is a somewhat complex and

technical regulation of debt collector practices, we conclude that it generally does not regulate creditors when they collect debt on their own account and that, on the facts alleged by the plaintiffs, Santander became a creditor when it purchased the loans before engaging in the challenged practices." *Id.* 4a-5a.

That conclusion turned principally on the court's interpretation of the phrase "regularly collects . . . debts . . . owed or due another."[31] The court viewed "owed or due another" as unambiguously excluding a defendant collecting a purchased debt. *See id.* 11a-14a. Because Santander did not qualify as a "debt collector" under the main definition, the court believed that the exclusion in Clause (F)(iii) for debts obtained while in default, and similar language in the definition of a "creditor," was irrelevant. *Id.* 14a-16a.

Finally, the court rejected petitioners' argument that Santander was a debt collector even on its own definition of debts "owed or due another." *See id.* 18a-19a. The court acknowledged the Complaint's allegation that Santander had been hired as a servicer of petitioners' debts before it purchased them. *See id.* 12a. It further recognized that "as a consumer finance company," Santander not only collects on the loans it purchases, but also "collects debt for others." *Id.* 18a-19a. In that sense, then, the court acknowledged that Santander regularly collects debts "owed or due another" on anyone's definition of

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[31] There is no claim that Santander falls within the "principal purpose" definition.

that phrase, because it regularly services other lenders' loans. *Id.* 19a. But the court rejected petitioners' argument that this meant that Santander was "subject to the FDCPA for *all* of its collection activities simply because one of its several activities involves the collection of debts for others." *Id.* Instead, it held that a company that regularly collects debts owed or due another "qualifies as a debt collector [only] when it engages in collection activity on behalf of another." *Id.* (quoting 15 U.S.C. § 1692a(6)).

3. The Fourth Circuit denied a timely petition for rehearing en banc, Pet. App. 41a-42a, and this Court granted certiorari.

SUMMARY OF ARGUMENT

I. The FDCPA generally regulates debt collectors, but not lenders collecting their own debts. The distinction is premised on Congress's belief that lenders "generally are restrained by the desire to protect their good will when collecting past due accounts," while "independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." S. Rep. No. 95-382, at 2 (1977).

To implement that insight, Congress defined "debt collector" to include one who "regularly collects . . . debts . . . owed or due another." 15 U.S.C. § 1692a(6). Congress intended this definition to extend beyond the archetypal third-party debt collector hired to pursue a debt on behalf of its originator. It recognized, for example, that debt servicers can have the same incentives as debt collectors. Congress therefore subjected servicers to regulation whenever they collect debt obtained after it has fallen into default. *See id.* § 1692a(6)(F)(iii).

In this case, respondent Santander was hired to service petitioners' debts after they had fallen into default and therefore was a covered "debt collector." The question is whether it escaped its responsibilities under the Act when it purchased those defaulted debts.

II. The Fourth Circuit held that it had because the court believed that debt purchasers unambiguously are *not* collecting debts "owed or due another," as required by the relevant prong of the "debt collector" definition. There is surface appeal to that view of the language standing in isolation. But

it is not compelled, and other parts of the definition point strongly in the other direction.

A. In common usage, one can refer to an assigned debt as "owed" the originator but "due" the assignee. The word "owed" is ambiguous as to its time reference. A debt purchaser might well tell a debtor, for example, that "we are collecting on a debt you owed Wells Fargo, which we purchased last month. The debt *owed* Wells Fargo is now *due* to us." Likewise, a rule that requires applicants for federal jobs to list "all debts owed or due a foreign government" could be referring to any debt *ever* owed to a foreign government (thereby including debts subsequently sold to someone else) or only debts presently owed a foreign government.

B. The ambiguity inherent in the phrase "owed or due another" can be resolved by reference to the broader statutory text. Section 1692a(F) provides that "debt collector" does *not* include

> any person collecting . . . any debt . . . *owed or due another* to the extent such activity . . . (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

15 U.S.C. § 1692a(6)(F). The exception for debts obtained prior to default strongly suggests that collection of debts obtained *after* default *are* subject to the Act. Moreover, the exceptions contemplate that it is possible for a person to "obtain" a debt – *e.g.*, through an assignment – yet still be collecting a debt "owed or due another," something that is

impossible under the Fourth Circuit's interpretation of that phrase.

Indeed, the secured creditor in Clause (F)(iv) is indistinguishable from a debt purchaser in all relevant respects – when it obtains a commercial borrower's accounts receivables upon the borrower's default of a commercial loan, the secured creditor obtains an assignment of the debts owed to commercial borrower (the originator of the loan) in the same way a debt purchaser receives an assignment of debts owed to the debt seller. Congress nonetheless referred to the secured creditor as collecting a debt "owed or due another," which can only make sense under petitioners' interpretation of that phrase.

C. Petitioners' interpretation is also more consistent with the statute's purposes. Santander was classified as a "debt collector" when it was servicing petitioners' defaulted debt because Congress assumed that in those circumstances, servicers would lack the restraining incentives of a loan originator and instead be more in the position of an ordinary debt collector. When Santander purchased the loans it had been servicing, nothing about those incentives changed. Debt buyers have the same basic incentives as other debt collectors, getting paid only if they collect and having little reason to care what the debtors think of them.

The Fourth Circuit's rule also provides debt buyers a roadmap for evading the FDCPA, encouraging, for example, large debt buyers to diversify their businesses enough to avoid regulation as "principal purpose" collectors, knowing that they will not be regulated as "regularly collects"

companies so long as they are collecting debts they have purchased.

III. Respondent's attempts to defend the Fourth Circuit's interpretation are unpersuasive.

A. Respondent says that Clause (F)(iii) is aimed at servicers who "obtain" a defaulted debt for servicing without ever securing an assignment or other ownership right in it. That is an implausible reading of the provision for various reasons, but it also is no answer to the secured creditor exception, which plainly contemplates secured creditors obtaining a debt in precisely the same sense as a debt purchaser, yet collecting a debt "owed or due another."

Respondent's reliance on the "creditor" definition is likewise unavailing. Even if Santander qualified as a "creditor," the definition of "debt collector" does not exclude "creditors." And, in any event, "creditor" is defined to exclude assignees of defaulted debt, which is reasonably understood to include debt purchasers.

B. Respondent suggests a narrow construction of the "regularly collects" definition is consistent with Congress's purposes because the worst debt purchasers are covered by the "principal purpose" definition. But there is no basis for that assertion, and certainly no reason to think Congress adopted that attitude when it enacted the statute, years before the advent of the modern, still evolving debt buying industry.

Respondent also argues that because it engages in other activities beyond collecting debts, it has an incentive to act reasonably to preserve its general

business reputation among consumers. But if Congress believed that kind of interest in a company's general reputation were sufficient protection, it would not have included the "regularly collects" prong in the statutory definition. After all, *every* company brought under the Act by that prong will have other business activities and could make the same argument.

IV. Finally, even if the Court accepts the Fourth Circuit's interpretation of "owed or due another," Santander would still be covered because, as its history with petitioners' debts shows, Santander regularly collects debts on behalf of other lenders, as part of its third-party servicing business. The Fourth Circuit wrongly concluded that the Act applies to a "regularly collects" company only when it is collecting a debt "owed or due another." Instead, the statute defines a company as a debt collector based on its general business model, then provides in its substantive provisions that a "debt collector" is restricted in its collection of "*any* debt." *See, e.g.*, 15 U.S.C. § 1692e (emphasis added). That scheme makes sense, as Congress could well presume that a debt collector will not vary its collection practices based on the specific nature of the debt it is collecting.

ARGUMENT

Congress enacted the Fair Debt Collection Practices Act in response to abuses by debt collectors who had substantial financial incentives to engage in aggressive collection practices and little countervailing interest in maintaining good relations with borrowers. 15 U.S.C. § 1692(a). Although Congress focused most particularly on third-party debt collectors, it recognized that other entities with similar incentives also collect consumer debt. It provided, for example, that loan servicers should be treated as debt collectors when they obtain the debt after it has fallen into default. *See id.* § 1692a(6)(F)(iii). Under that rule, respondent Santander was operating as a debt collector when it began servicing petitioners' defaulted debt. The question is whether Santander successfully escaped the statute's restrictions when it purchased the defaulted debt it was previously servicing. That financial transaction did nothing to change the incentives that led Congress to regulate Santander as a debt servicer. And contrary to the court of appeals' conclusion, nothing in the language of the statute nonetheless requires depriving petitioners of the protections the Act affords them.

Instead, as the majority of circuits have long held, debt buyers are collecting debts "owed or due another," as that phrase is used in the statute, because the debts are properly viewed as "owed" the originator, even if "due" the purchaser. At the very least, a company like Santander – which regularly collects debts indisputably "owed or due another" as part of its third-party debt servicing practice – is a debt collector subject to the Act with respect to all its

collections, including its collection of purchased debts.

I. The FDCPA Generally Applies To All The Collection Activities Of A Company That Regularly Collects Debts Owed Or Due Another, Including Servicers That Obtain Debt In Default.

Unless a specific exception applies, a business is a "debt collector" if its "principal purpose . . . is the collection of any debts" or it "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." *See* 15 U.S.C. § 1692a(6). The archetypical debt collector under this definition is a third-party debt collector seeking to recover debts originated by some other lender. But Congress intended the Act to extend to others posing similar risks to consumers as well, including debt servicers, like Santander, who obtain debt after it has already fallen into default.

1. In defining who is and is not a debt collector, Congress was driven by the insight that while lenders have built-in incentives to act with restraint when collecting debt from their own customers, third parties lacking that customer relationship have substantial financial incentives to act aggressively without similar countervailing reasons for restraint. "Unlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts," the Senate Report explained, "independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." S. Rep. No. 95-382, at 2 (1977).

Third-party debt servicers can occupy a middle ground between a lender collecting its own loans or a third-party debt collector hired to collect someone else's debt. On the one hand, a servicer tasked with collecting on a loan while it is still in good standing is in many ways like an originator's in-house servicer, performing a variety of tasks for the lender and the customer (such as maintaining escrow accounts, fielding customer questions, etc.) beyond debt collection. Treating customers decently helps ensure that they will continue to keep their accounts in good standing. And because they are performing a task that is often performed by the lender itself, the servicer's actions may be attributed to the lender by the customer and by the borrowing public.

On the other hand, the analogy is imperfect. Like a third-party debt collector, a servicer's customer is the lender, not the borrower. The servicer's customer will be happier if the servicer collects more money while the ill-will of debtors has, at best, only an indirect effect on the servicer's business prospects. Particularly when seeking payment of a loan that is in default when obtained, servicers may therefore have an incentive to engage in rough practices (since prior attempts to secure payment will have failed).

So Congress drew a line that depended on the status of the loan, treating services who obtain debt before it goes into default more like the lenders they serve and servicers who obtain debt after default as a species of debt collector. That is, because third-party servicers have no interest in the debt they service, they fall within the initial "debt collector" definition as companies that "regularly collect" debt "owed or

due another" under any understanding of that phrase. *See* 15 U.S.C. § 1692a(6). Clause (F)(iii) then exempts servicer's collection on any debt "not in default at the time it was obtained."

2. Accordingly, there can be no dispute that Santander was subject to the FDCPA with respect to petitioners' debts while it was servicing them on behalf of the loan originator, CitiFinancial Auto. J.A. 23 (Complaint ¶ 47) (alleging that Santander started servicing the loans after they had fallen into default). [32] The question is whether Santander successfully bought itself out of FDCPA coverage when it purchased the defaulted debt it was previously collecting.

II. Santander Did Not Exempt Itself From The FDCPA By Purchasing The Defaulted Debt It Was Previously Servicing.

The Fourth Circuit nonetheless held that Santander's purchase of the defaulted debts it was servicing excluded it from the Act. In the court's view, a company collecting purchased debt unambiguously is not collecting a debt "owed or due another" within the meaning of the "regularly collects" definition. Pet. App. 11a-13a. That conclusion was wrong. It is entirely reasonable to treat a purchased debt as "owed" the originator yet "due" the purchaser. While that may not be the most

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[32] Moreover, Santander was not acting as a creditor under any interpretation of that term, as it neither originated the loan nor had any claim that the loan was "owed" to it at that time. *See* 15 U.S.C. § 1692a(6)(A).

natural interpretation of the phrase standing in isolation, it is the best interpretation of that language in light of other text in the definition, other language in the statute, and the Act's purposes.

A. A Debt Buyer Is Collecting A Debt "Owed" The Originator And "Due" The Purchaser Within The Meaning Of The Statute.

In common usage, it is easy enough to say that someone collecting on an assigned debt is collecting a debt "owed" the originator, even if the assignee has a right to collect it.[33]

It would be perfectly natural, for example, for an assignee to tell a consumer "we are collecting on a debt you owed Wells Fargo, which we purchased last month. The debt owed Wells Fargo is now due to us." After all, consumers may naturally think of a debt as being "owed" to the person who loaned them the money, not to someone with whom they have had no dealings.

That conception of an assigned debt is not novel; in fact, it was the prevailing view in the law for many years. Historically, assignees could sue on an assigned debt only by securing a power of attorney that allowed them to collect the debt in the name of the originator, precisely because the law viewed the debt as owed the originator not the assignee. *See Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554

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[33] The words Congress used to describe debts – *e.g.*, "owed," "due," "obtained," or "transferred," *see* 15 U.S.C. § 1692a(4), (6)(F)(iii) – are not legal terms of art.

U.S. 269, 277 (2008); RESTATEMENT (SECOND) OF CONTRACTS ch. 15 introductory note (AM. LAW. INST. 1981). In modern times, that formality has given way, *Sprint*, 554 U.S. at 279-80, but the original intuition that an assigned debt can be viewed as owed the originator, but collectable by the assignee, remains.

Accordingly, Congress's reference to a debt "owed or due another" can be understood to contemplate that an assigned debt is *presently* owed the originator, even though it is due the assignee. But even if this Court disagreed, the statute refers to debts "owed" another, not debts "owing" another. And that formulation is ambiguous with respect to the relevant time frame. It can refer to debts that are presently owing another, were previously owed another, or both.

For example, consider a rule that requires applicants for federal jobs to list "all debts owed or due a foreign government." The rule would be ambiguous as to whether the applicant must list loans originated by a foreign government, but later assigned to someone else or paid off. To decide which was meant, one would need to consider the purpose of the rule.

Respondent points out that "debt owed or due another" is the direct object of the present-tense verbs "collects" and "attempts to collect." BIO 26 (quoting 15 U.S.C. § 1692a(6)). It gives the example of a librarian who "regularly collects books placed on the table" and insists that as a matter of grammar, the books must be on the table at the time of collection. *Id.* Not so. Take the example of the "person who regularly collects artwork owned by

celebrities." Such a person could collect works currently or previously owned by celebrities, or both. The present tense of the verb "collects" does not resolve the ambiguity. The assumption that the librarian is collecting books that are on the table at the time of collection arises not from grammar, but from context – the sentence literally requires only that the books have been placed on the table at some point in the past; we assume they are still there at the time of collection because, otherwise, how would the librarian find them? But that implication will not always arise. Here, for example, it is perfectly possible for an assignee to presently collect a debt that was previously owed to someone else.

B. Petitioners' Interpretation Of "Owed Or Due Another" Is Most Consistent With Other Uses Of That Phrase, And Other Textual Cues, In The "Debt Collector" Definition.

Of course, the phrase "owed or due another" cannot be read in isolation from the rest of the "debt collector" definition. *See, e.g., Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 587-88 (2010) ("In reading a statute we must not look merely to a particular clause, but consider in connection with it the whole statute." (citation omitted)). An examination of the broader statutory text is particularly revealing in this case because the phrase "owed or due another" is repeated elsewhere in the "debt collector" definition.

Specifically, section 1692a sets out a series of exceptions to the general "debt collector" definition, culminating in Clause (F), which excludes:

> any person collecting or attempting to collect ***any debt owed or due or asserted to be owed or due another*** to the extent such activity . . . (iii) concerns a debt which was not in default at the time it was ***obtained*** by such person; or (iv) concerns a debt ***obtained*** by such person as a secured party in a commercial credit transaction involving the creditor.

15 U.S.C. § 1692a(6)(F) (emphasis added).

Clause (F) as a whole applies only to those collecting debts "owed or due another," the same phrase in the general definition. At the same time, subsections (iii) and (iv) both address persons who collect a debt they "obtained" from another. The most obvious way in which one "obtains" a debt is through assignment, which Congress understood to be common among debt servicers. *See, e.g.*, § 1692a(4) (addressing those who receive "an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another"); *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 456-57 (6th Cir. 2013). And, of course, debt buyers are also assignees of debt originated by others.[34] Accordingly, Clause (F) provides important insights into the meaning of "owed or due another" and how Congress intended debt buyers and other assignees to be treated.

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[34] *See Dirty Debts*, *supra*, at 45 ("A debt sale, at its essence, is an assignment from a seller to a buyer of 'any legal interest' the seller has against the account holder.").

First, Clause (F) itself uses the phrase "owed or due another" to refer to debts assigned to the collector after origination by someone else. That is, Clause (F) as a whole applies only to a person "collecting . . . any debt . . . owed or due another," the same phrase used in the "regularly collects" definition. Subclauses (iii) and (iv) then exclude such persons when they are collecting a debt "which was not in default at the time it was obtained by such person" or was obtained through a secured credit transaction. Thus, Clause (F)(iii) contemplates the existence of assignees who "obtained" a debt originated by someone else, yet are collecting a debt "owed or due another."

That usage is completely consistent with petitioners' interpretation – a debt is "owed or due another" so long as it was originated by someone other than the collector. But it is very difficult, if not impossible, to square with the Fourth Circuit's interpretation, under which it is nonsense to talk about an assignee collecting a debt "owed or due another." *See* Pet. App. 13a-14a.

Second, Clause (F)(iv), confirms that "owed or due another" can refer to those, like debt purchasers, who are presently due payment on a debt originated by someone else. This "secured creditor" provision applies to "a commercial lender who acquires a consumer account that was used as collateral" in a commercial credit transaction "following default on a loan from the commercial lender to the original

creditor."[35] If the borrower defaults, the secured creditor obtains the right to collect the debts owed the borrower. *See, e.g.*, *Friedman v. Textron Fin. Corp.*, No. 96 C 7983, 1997 WL 467175 (N.D. Ill. Aug. 12, 1997) (applying exception).

A secured creditor thus "obtains" debts in the same sense as a debt purchaser: as a consequence of extending money to the debt originator, the secured creditor and the debt buyer obtain an assignment of the right to collect the debt for themselves.

Clause (F)(iv) thus contemplates a secured creditor who is owed a debt it has obtained from another, yet is collecting a debt "owed or due another." The only way to make sense of that language is to understand that when the secured creditor collects on the debt it has thus obtained, it is collecting a debt that is *owed another* in the sense of having been originated by another but presently *due* the secured creditor. And if the same phrase is to be given a consistent interpretation throughout the definition, Santander was likewise collecting a debt "owed or due another" when it collected debts originated by others but due itself by virtue of its debt purchases.

Third, in stating that those who obtain a non-defaulted debt are *not* debt collectors, Clause (F)(iii) strongly suggests that those who obtain a debt *after*

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[35] Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097, 50103 (Dec. 13, 1988).

it has fallen into default (as Santander did here) *are* debt collectors.

Fourth, creating an exception for those who obtain non-defaulted debt implies that Congress believed an exception was necessary – *i.e.*, that the assignees would otherwise fall within the statutory definition of "debt collector." If the Fourth Circuit were right that assignees are not collecting debts "owed or due another," they would need no exception and the Clause (F)(iii) and (iv) exceptions would be largely surplusage.[36]

C. Petitioners' Interpretation Best Aligns With The Statute's Purposes.

Treating buyers of debt already in default as debt collectors also best accords with the statute's premises and purposes.

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[36] Clause (F)(ii) also provides an exception for those collecting a debt "originated by such person." That exception applies when a loan originator sells a loan, but continues to service the loan (as is common for mortgage loans, *see supra*, at 8 n.10). On petitioners' interpretation, the originator/servicer falls within the main definition of "debt collector" because it regularly collects debts presently due debt purchasers ("owed or due another" being written in the disjunctive). But it exempted from coverage with respect to the loans it originated by Clause (F)(ii).

1. Purchasers Of Defaulted Debt Have The Same Incentives For Abuse As Other Debt Collectors, While Lacking The Countervailing Incentives Of Ordinary Creditors.

In every respect relevant to Congress's guiding rationale, purchasers of defaulted debt are virtually indistinguishable from the servicers of defaulted debt Congress took care to bring within the Act's coverage.

a. As discussed, the central premise of Congress's distinction between the debt collectors it intended the FDCPA regulate and the creditors it intended to exclude was that creditors have built-in incentives to act with restraint when collecting debt from their own customers, whereas debt collectors have substantial financial incentives to act aggressively without similar countervailing incentives for restraint. *See* S. Rep. No. 95-382, at 2 (1977).

The incentives for restraint come not from owning a debt, but from having originated it. Lenders make their money by originating debts, and how they treat their customers during loan servicing can affect not only customers' propensity to borrow again, but also their willingness to recommend (or bad mouth) the lender to friends and family. The creditors Congress had in mind thus must balance the desire to collect fully on their debts against the need not to alienate existing customers or establish a bad reputation among potential future customers. *See, e.g.*, H.R. Rep. No. 94-1202, at 3 (1976) ("An example of a person that would not be covered by the bill is a business that extends credit and only collects debts incidental to the extension of such credit or

debts owed to such business. . . ."); Senate Comm. on Banking, Housing & Urban Affairs, Markup Session: S. 1130 Debt Collection Legislation 23 (June 30, 1977) (Sen. Riegle) (sponsor of FDCPA stating "the concern about third parties, whether they be banks or anybody else that put themselves in business to collect debts where they were not *a party to the original transaction*, their good will is not on the line, their customer relationship is not on the line") (emphasis added); *id.* at 25 (banks "collecting from people who are not their customers but somebody else's customers" are debt collectors under the FDCPA).

In contrast, when Congress identified the kind of collectors it intended the Act to cover, it spoke of entities that, like debt purchasers, have no interest in loaning debtors money in the future. After all, a debt collector's customer is the creditor, not the borrower. And debt collectors generally earn their money by keeping a percentage of the funds they are able to collect.[37] Accordingly, Congress recognized that debt collectors have a very substantial economic incentive to do whatever works to collect a debt, even to the point of engaging in deception, harassment, and abuse. *See, e.g.*, S. Rep. No. 95-382, at 2-3 (1977).

Viewing servicers as falling somewhere in the middle, Congress drew a line that depended on the status of the loan, reasoning that companies that take on defaulted debt for servicing are acting with

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[37] *See Challenges of Change*, *supra*, at 3.

incentives more closely approximating a third-party debt collector than a lender. *See supra* § I.

b. The history of this case makes abundantly clear that debt purchasers have much more in common with defaulted debt servicers and other debt collectors than with the kinds of creditors Congress believed could be left to market constraints.

Before purchasing petitioners' debts, Santander *was* a covered servicer, hired to collect debts owed to the originator after those debts had fallen into default. The only thing that changed when Santander purchased the debt was the financial arrangement between Santander and CitiFinancial Auto. Instead of keeping a fixed percentage of the debts and forwarding the rest to the originator, Santander paid the originator's portion in advance in order to maintain the right to keep all of what it recovered. That transaction reallocated the risk of non-recovery between Santander and CitiFinancial Auto, but did nothing to eliminate the risk of abusive collection practices that led Congress to subject Santander to the FDCPA as a debt servicer.

If anything, the risk to consumers was enhanced. A servicer of defaulted debt at least maintains an ongoing relationship with the originator, creating the possibility that the originator might pressure the servicer to abandon abusive practices lest the servicer's bad conduct be attributed to the lender. Selling the debt severs that relationship and eliminates the originator's leverage over the collector.

At the same time, when debt is in default at the time of purchase, the incentives for aggressive collection practices are particularly high. After all,

the debt buyer knows that ordinary servicing and collection practices had failed to prevent the default.[38] To make any money off the transaction, the buyer will have to succeed where others have failed, perhaps through methods that risk crossing the line the FDCPA was enacted to maintain.

This case also illustrates how the sale of debts gives rise to the same kinds of informational problems as hiring third-party debt collectors, where miscommunications and poor records can lead to collectors demanding payment of debt that is satisfied, time-barred, or extinguished, seeking the wrong amount, providing debtors inaccurate information, or even dunning the wrong person. *See supra*, at 9-11.

c. Given the fundamental similarities between debt buyers, servicers of defaulted debt, and third-party debt collectors, it is not surprising that debt purchasers have regularly been accused of, or found to have engaged in, the same aggressive collection practices as their debt collector brethren. For example, in *Federal Trade Commission v. Check Investors, Inc.*, 502 F.3d 159 (3d Cir. 2007), the Government brought FDCPA claims against a debt buying company founded by individual who had been imprisoned for impersonating an FBI agent when working as a debt collector. *Id.* at 162-63. Believing he could avoid the FDCPA, the defendant purchased defaulted debt of the kind he had previously collected on contingency. *Id.* The new business's "primary

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[38] *See Challenges of Change*, *supra*, at 2-3.

modus operandi was to accuse consumers of being criminals or crooks, and threatening them with arrest and criminal or civil prosecution." *Id.* at 163. For instance, one "consumer was told that if she did not pay, her children would 'watch their mother being taken away in handcuffs,' and they would 'be bringing their mommy care packages in prison.'" *Id.* These threats "were all false," but effective. *Id.* "In one case, Check Investors repeatedly called a 64-year old mother regarding her son's debt; fearing that her son would be arrested and carted off to jail, she paid the amount of the demand." *Id.* at 164. The demanded amount typically included "a fee of $125 or $130 [added] to the face amount of each check; an amount that exceeded the legal limit for such fees under the laws of most states." *Id.* at 163.

The Federal Government has likewise brought charges against some of the largest debt buyers in the industry, accusing them of engaging in deceptive and abusive practices of the sort the FDCPA was enacted to prevent. For example, in 2004, the FTC settled claims against one debt buyer it alleged had "threatened and harassed thousands of consumers to get them to pay old, unenforceable debts or debts they did not owe," "[u]sing obscene or profane language," "[c]alling consumers continuously with the intention of annoying and abusing them," "[m]isrepresenting themselves as attorneys," and "[t]hreatening imprisonment, seizure, garnishment, attachment or sale of property or wages with full knowledge that such action could not legally be

taken."[39] Even after the settlement, the debt buyer continued to engage in illegal misconduct, requiring further enforcement action.[40]

More recently, the Government filed FDCPA claims against the country's two largest debt buyers, alleging, among other things, that "[w]ithout verifying the debt, the companies collected payments by pressuring consumers with false statements and churning out lawsuits using robo-signed court documents," including lawsuits that they knew or should have known were barred by the statute of limitations.[41] Similar abuses have been documented elsewhere.[42]

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[39] *See* Press Release, Fed. Trade Comm'n, Debt Buyer/Debt Collection Companies and Their Principals Settle FTC Charges (Mar. 24, 2004), *available at* https://www.ftc.gov/news-events/press-releases/2004/03/debt-buyerdebt-collection-companies-and-their-principals-settle.

[40] *See* Press Release, Fed. Trade Comm'n, Debt Collector Settles with FTC for Abusive Practices (Mar. 12, 2007), *available at* https://www.ftc.gov/news-events/press-releases/2007/03/debt-collector-settles-ftc-abusive-practices.

[41] *See* Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action Against the Two Largest Debt Buyers for Using Deceptive Tactics to Collect Bad Debts (Sept. 9, 2015), *available at* http://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-the-two-largest-debt-buyers-for-using-deceptive-tactics-to-collect-bad-debts.

[42] *See, e.g.*, Rick Jurgens & Robert J. Hobbs, Nat'l Consumer Law Ctr., The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts 18 (July 2010), *available at* https://www.nclc.org/images/pdf/debt_collection/debt-machine.pdf; Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M. L. REV. 327

2. *Treating Purchasers Of Defaulted Debt As Debt Collectors Avoids Market-Distorting Incentives And Protects Ethical Debt Purchasers.*

The court of appeals' interpretation also creates incentives that may distort market incentives for the debt collection industry and secondary debt markets.

To start, the decision may encourage companies to change their business models in ways that serve no purpose other than to avoid FDCPA coverage. For example, a debt servicer like Santander can avoid the Act simply by obtaining title to the debt it is collecting. It may even do so without materially changing the terms of its contract with the original debt owner (*e.g.*, the terms of the sale could retain the same basic financial arrangement, with the servicer keeping more or less the same portion of what it collects and being obligated to pass the remainder on to the originator). Likewise a law firm, like the one this Court considered in *Heintz v. Jenkins*, 514 U.S. 291 (1995), could avoid the Act by agreeing to take title to the debts it previously collected for clients, paying the client a portion of what it collects as the price (rather than keeping a portion of what it collects as a contingency fee, as it would have done before).

(2014); Jake Halpern, *Paper Boys: Inside the Dark, Labyrinthine, and Extremely Lucrative World of Consumer Debt Collection*, N.Y. TIMES MAG. (Aug. 15, 2014), https://nyti.ms/2jRQHU6.

Similarly, a company whose principal purpose is the collection of purchased defaulted debt may be encouraged to diversify its practices, or to merge previously separate subsidiaries, in order to create a company whose principal purpose is no longer debt collection, yet whose debt collection practices fall outside the scope of the FDCPA under the Fourth Circuit's interpretation because the debts collected are owed to the purchaser.

At the same time, debt purchasers engaged in ethical collection practices may suffer a competitive disadvantage if others with fewer scruples are free from FDCPA coverage. *See* 15 U.S.C. § 1692(e) (among statute's purposes is "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged"). Debt buyers are generally participating in a common market to purchase defaulted debt.[43] The price for the debt depends substantially on predictions about collection prospects.[44] If there are some bidders whose collection practices are unrestrained by the FDCPA, they may perceive their chances of recovery as higher than do their competitors who are subject to the Act, and bid up the price. All companies pay more for defaulted debt as a result, including those restrained by the FDCPA or ethics to forego aggressive practices. At the same time, the increase in debt prices creates greater pressure on all winning bidders

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[43] *See Dirty Debts*, *supra*, at 52-53.

[44] *Id.* at 54.

to successfully collect, leading to exactly the risks the FDCPA was enacted to address.

3. Petitioners' Interpretation Avoids Anomalous Gaps In FDCPA Coverage.

The Fourth Circuit's interpretation also creates an anomalous gap in coverage that serves no statutory purpose.

As respondent seemingly acknowledges, even under the Fourth Circuit's interpretation of "owed or due another," a debt purchaser is a "debt collector" under the "principal purpose" prong if collecting debts (including purchased debts) is its principal purpose. *See* BIO 24; *see also Davidson*, 797 F.3d at 1311, 1316 n.8 (11th Cir. 2015). Moreover, nothing in the Act provides an exemption for a "principal purpose" collector's attempts to collect debts it acquired after they had fallen into default. *See* 15 U.S.C. § 1692a(6)(F)(iii).[45]

At the same time, even if this Court accepted the Fourth Circuit's interpretation of "owed or due another," that would exempt only a random slice of companies that regularly collect purchased defaulted debt. In particular, it would *not* exempt companies, like Santander, that regularly act as third-party servicers for other lender's loans *in addition* to collecting debts they have purchased for themselves. *Contra* Pet. App. 18a-19a. That is because a company's status as a "debt collector" under the main definitions turns on its general business model – *i.e.*,

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[45] Nor does the "creditor" definition provide any basis for exclusion. *See infra* § III.A.2.

what kind of debts does the defendant *regularly* collect – not the particulars of any given debt. Indeed, it makes no sense to ask whether a company "regularly" collects a specific debt. Accordingly, by regularly servicing others' loans, a debt buyer falls within the "regularly collects" definition because it regularly collects debts indisputably "owed or due" the owner of the serviced debt. *See* 15 U.S.C. § 1692a(6).

Moreover, once classified as a debt collector, *all* of a company's debt collection practices are subject to the Act's substantive requirements, unless specifically exempted. That is because the Act's substantive provisions apply to any "debt collector" attempting to collect "a" or "any" debt – they are not limited to attempts to collect a debt "owed or due another." *See* 15 U.S.C. § 1692c (regulating circumstances in which "a debt collector may . . . communicate with a consumer in connection with the collection of *any* debt") (emphasis added); *id.* § 1692d (prohibiting a "debt collector" from engaging in harassment "or abuse of any person in connection with the collection of *a* debt") (emphasis added); *id.* § 1692e (a "debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of *any* debt") (emphasis added); *id.* § 1692f ("A debt collector may not use unfair or unconscionable means to collect . . . *any* debt.") (emphasis added); *id.* § 1692g (regulating "a debt collector['s]" initial communications "with a consumer in connection with the collection of *any* debt") (emphasis added); *id.* § 1692i (regulating lawsuits filed by "[a]ny debt collector who brings any

legal action on *a* debt against *any* consumer") (emphasis added).

Instead, the Act provides specific exemptions for debt collectors attempting to collect particular kinds of debts, such as the debts obtained prior to default addressed in Clause (F)(iii). Significantly, there is no general exception for "regularly collects" companies attempting to collect debts "owed or due another." *See id.* § 1692a(6)(A)-(F). And there is no exemption for collecting debts that were obtained after falling into default. *See id.* § 1692a(6)(F)(iii).

As a result, adopting the Fourth Circuit's interpretation of "owed or due another" would exclude from coverage only debt purchasers that are diversified enough to avoid coverage under the "principal purpose" definition, yet not so diversified as to be servicing other lenders' debt. Nothing in the Act's purposes or history suggest why Congress would have intended to exempt that very particular slice of the debt purchasing industry.

III. Respondent's Arguments In Favor Of A Narrower Definition Cannot Be Squared With The Text Or Purposes Of The Act.

Respondent's attempts to defend the Fourth Circuit's interpretation are unpersuasive.

A. Respondent's Textual Arguments Are Unpersuasive.

Respondent has understandably emphasized the intuitive appeal of their interpretation of "owed or due another" standing in isolation. BIO 25-26. But as discussed, that interpretation is not compelled and

is very difficult to reconcile with the rest of the "debt collector" definition.

1. Respondent's Alternative Account Of Clause (F) Fails.

Respondent has suggested that the Fourth Circuit's interpretation can be reconciled with Clause (F)(iii) by viewing the exception as aimed at debt servicers that "obtain" a debt through some method other than assignment, such that they have "possession" of the debt, but not title to it. BIO 27-28. On that view, it says, Clause (F)(iii) is not rendered completely surplusage. BIO 28.

This is an odd usage of the word "obtain," which ordinarily connotes acquiring some ownership interest in the thing obtained.[46] Indeed, if all that is required to "obtain" a debt is securing a contract to collect it, ordinary third-party debt collectors would "obtain" every debt they collect. And by virtue of Clause (F)(iii), they would be freed from the Act's coverage whenever they begin to collect a debt prior to its going completely into default.[47] But there is no basis to believe Congress intended to scale back the scope of the FDCPA based on such an unintuitive interpretation of a subclause of an exception to the principal definition.

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[46] *See, e.g.*, 11 U.S.C. § 523(a)(2) (precluding discharge of a "debt . . . obtained by . . . false pretenses" or other improper means).

[47] A loan is generally understood to go into "default" within the meaning of the FDCPA only after a period of persistent nonpayment. *See, e.g., Alibrandi v. Fin. Outsourcing Servs., Inc.*, 333 F.3d 82, 86-87 (2d Cir. 2003).

In any event, even assuming that servicers operating without an assignment have "obtained" a debt, that surely is not the only way in which a debt may be "obtained." As noted, the word most naturally refers to receiving a debt by virtue of an assignment. And if the phrase includes servicers with an assignment, the problem is not avoided – the assignee is owed the debt by virtue of the assignment yet is still collecting a debt "owed or due another" as Congress understood that term.

Respondent's proposal is also no response to Clause (F)(iv). Even if it is possible for a loan servicer to "obtain" a debt without being "owed" the debt, that certainly is not true of a secured creditor, who obtains a debt in exactly the same sense as a debt buyer – *i.e.*, through an assignment that results in the debt being "owed or due" the secured creditor on respondent's and the Fourth Circuit's interpretation of that phrase.

2. The "Creditor" Definition Does Not Salvage Respondent's Interpretation.

Respondent also claims support for the Fourth Circuit's ruling in the definition of a "creditor," which includes:

> any person who offers or extends credit creating a debt or *to whom a debt is owed*, but such term does not include any person *to the extent that he receives an assignment or transfer of a debt in default* solely for the purpose of facilitating collection of such debt *for another*.

15 U.S.C. § 1692a(4) (emphasis added); *see* BIO 26.

Santander reasons that as an assignee of a debt, a debt purchaser is a person "to whom a debt is owed," and is therefore a creditor not a debt collector. BIO 26, 29. That argument is wrong for two reasons.

First, the argument's premise – that a "creditor" cannot be a "debt collector" – is wrong.

While it is generally true that creditors tend not to qualify as debt collectors given the way the "debt collector" definition and its exceptions are written, the "debt collector" definition has no general exception for creditors. To the contrary, it expressly exempts only an "officer or employee of a creditor" in certain circumstances. *Id.* § 1692a(6)(A).

It also makes sense that some debt purchasers may qualify as both creditors and debt collectors, given the other uses of the word "creditor" in the statute. For example, the Act requires debt collectors' initial communications with a debtor to identify the "creditor" to facilitate payment of the claimed debt. 15 U.S.C. § 1692g(a)(2). It would make sense to require a debt purchaser to inform the debtor that payment of the debt is now due the purchaser, yet preclude the purchaser from collecting that debt through deceptive or abusive means.

This distinct function of "creditor" also explains why the "creditor" definition refers to one "to whom a debt *is* owed," using the present tense, while the definition of "debt collector" refers to a debt "owed or due another," a formulation capable of referring both to debts presently due another and those previously owed another. *See supra* § II.A. To serve its purpose in the Act's substantive provisions, "creditor" needs to refer to the person to whom the debt is presently

owed. But to serve *its* purpose, the definition of "debt collector" must be broader.

Second, Santander is not petitioners' "creditor" in any event. Even if a defaulted debt purchaser were a "creditor" under the initial definition of that term, it would nonetheless fall within the "assignee exception" properly construed because it obtained the debt by assignment after the debt had fallen into default.

The Fourth Circuit disagreed, pointing out that this "assignee exception" only applies to those who receive an assignment of defaulted debt "solely for the purpose of facilitating collection of such debt *for another*." Pet. App. 8a (quoting 15 U.S.C. § 1692a(4)). The court assumed that it was impossible for a party collecting on its own account to be collecting a debt "for another," and therefore the exception could not apply to a debt purchaser.

That line of reasoning points to an inherent ambiguity (one might even say contradiction) within the assignee exception itself, not a problem particular to petitioners' interpretation. That is, the "assignee exception" only ever applies to those assigned or transferred a debt. And an assignment ordinarily results in the debt being owed the assignee. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 317 (AM. LAW. INST. 1981). Yet the assignee exception contemplates an assignee collecting the assigned debt "for another." Conversely, someone collecting a debt "for another" in the sense assumed by the Fourth Circuit would be in no need of an exemption from the

"creditor" definition in the first place because the collector would not be the person "to whom a debt is owed." 15 U.S.C. § 1692a(4).[48]

These seeming contradictions can be resolved, consistent with the best interpretation of the "debt collector" definition, by viewing an assignee as being presently "owed" the debt but collecting the debt "for another" in the sense of standing in the originator's shoes. *See For*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/for (last visited Feb. 16, 2017) ("for" can mean "in place or" or "with respect to"); *see also* U.S. BIO 11-12, *Check Investors, Inc. v. FTC*, No. 08-37.

This resolution is consistent with another use of "creditor" in the main "debt collector" definition, which provides:

> ***Notwithstanding the exclusion provided by clause (F)*** of the last sentence of this paragraph, the term includes any ***creditor*** who, in the process of ***collecting his own debts***, uses any name other than his own . . . .

15 U.S.C. § 1692a(6) (emphasis added). This "own name" proviso assumes that a "creditor . . . collecting his own debts" might qualify for a Clause (F) exception. But Clause (F) only applies to a person "collecting . . . any debt . . . owed or due another."

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[48] The "creditor" definition also includes debt originators, *id.*, but it is difficult to imagine that the assignee exception is aimed at a person who originates a debt and then somehow is later assigned the debt.

Congress thus contemplated that a "creditor . . . collecting his own debts" could also be a person collecting a debt "owed or due another." That is only possible if "owed or due another" is understood to include debts presently due the creditor but originated by someone else.

Treating purchasers of defaulted debt as within the "assignee exception" also aligns the references to defaulted debt in the "creditor" and "debt collector" definitions. The combined gist of the exceptions is that assignees who obtain a debt when it is in default are debt collectors, not creditors, while those who obtain the debts prior to default are creditors, not debt collectors.

B. Respondent Cannot Reconcile Its Interpretation With The Statute's Purposes.

Respondent has made two arguments thus far as to why its interpretation is consistent with the statutory purposes, but neither is convincing.

First, respondent suggests that coverage of companies like Santander is unnecessary because the worst debt buyer offenders will be covered by the "principal purpose" prong of the definition. BIO 3, 23-24.[49]

There is no factual basis for that claim. While principal purpose collectors have indeed engaged in

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[49] That suggestion fails at the outset unless respondent is willing to agree with petitioners that the "creditor" definition does not immunize debt purchasers collecting debt obtained in default.

some egregious practices, there are examples of unlawful conduct by others who regularly collect debts without debt collecting being the principal purpose of their business. *See, e.g.*, *Davidson*, 797 F.3d at 1311 (bank that purchased defaulted debt alleged to have engaged in "'mass produced, 'robo-signed'" lawsuits premised on false statement and inaccurate information); *Hoen v. FCC Finance, LLC*, 126 F. Supp. 3d 472, 473 (D.N.J. 2015) (debt sold three times, culminating in final purchaser, a consumer finance company like Santander, attempting to collect on debt allegedly paid thirteen years earlier).[50]

Nor, in any event, is there any basis for the assumption that at the time Congress enacted the statute, it was relatively unconcerned about entities like respondent. In fact, Congress was sufficiently worried about the much-less-suspect debt servicer industry that it made debt servicers subject to the Act whenever they obtain a debt that is already in default.

Moreover, the present structure of the debt buying market is a hazardous basis for inferring Congress's intent at the time the statute was enacted. The advent of the modern debt buying industry postdates the FDCPA's enactment.[51] This relatively new industry also continues to rapidly evolve. Whereas the debt buying industry was previously dominated by companies that specialized

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[50] *See* About Us, http://www.fccfinance.com/about-us/.

[51] *CFPB 2014 Annual Report*, *supra*, at 7.

in debt buying and may well fall within the "principal purpose" definition, in recent years they have been joined by hedge funds and the likes of Goldman Sachs, diversified companies that will be covered by the FDCPA if at all, only under its "regularly collects" prong. *See supra*, at 9.

Second, Santander also argues that "regularly collect" companies like Santander have other business and, therefore, an incentive to keep their good name. BIO 23-24.

This is not necessarily so. For example, hedge funds and other investors recently entering the debt purchasing market may have no other line of business that depends on maintaining the goodwill of the consumers whose loans they purchase.

But in any event, if Congress believed that simply having another line of business beyond debt collection was a sufficient restraint on collection activities, it is hard to see why it included "regularly collects" companies in the first place. After all, by definition, a defendant subject to the statute solely under the "regularly collects" prong will necessarily be conducting other business as well. Yet its presumed interest in keeping a good general reputation did not prevent Congress from subjecting them to the statute.

Indeed, as discussed, the statute covers financial services companies that obtain debt in default for servicing. *Supra* § I. Those servicing companies could well argue, as Santander does here, that because of their other servicing activities (*e.g.*, with respect to non-defaulted debt), they have an incentive to refrain from abusive practices. But Congress

obviously thought those incentives were insufficient. In fact, the Senate Report goes out of its way to make clear that the "debt collector" definition "would include 'reciprocal collections' whereby one creditor regularly collects delinquent debts for another pursuant to a reciprocal service agreement, unless otherwise excluded by the act." S. Rep. No. 95-382, at 3 (1977); *see also* Senate Comm. on Banking, Housing & Urban Affairs, Markup Session: S. 1130 Debt Collection Legislation 16-18, 23-25 (June 30, 1977) (debate over unsuccessful proposed amendment to exempt banks and retail establishments collecting each other's debts based on such reciprocal collection arrangements). This, despite the obvious need for banks and other creditors to maintain a good reputation with consumers generally.

IV. Purchasers Of Defaulted Debt Are At Least Covered "Debt Collectors" When They Regularly Collect Debts Owned By Others In Addition To Collecting The Debts They Have Purchased.

For the foregoing reasons, the answer to the Question Presented is that a company that regularly attempts to collect debt that it purchased after default is *always* a "debt collector" because, in collecting the defaulted debt, it is collecting a debt "owed or due another." But as discussed earlier, even if this Court accepted the Fourth Circuit's view that a purchased debt is owed and due the purchaser, not another, Santander is still a "debt collector" because it regularly collects debts owed others as part of its

third-party debt servicing practice. *See supra* § II.C.3.[52]

The Fourth Circuit reached the contrary conclusion below, believing that "an entity that 'collects or attempts to collect . . . debts owed or due . . . another' on a regular basis qualifies as a debt collector [only] *when it engages in collection activity on behalf of another*." Pet. App. 19a (emphasis in original) (quoting 15 U.S.C. § 1692a(6)). The italicized language, which is doing all the work in the sentence, is outside the quotation marks for a reason: the limitation is nowhere in the actual text of the statute.

Instead, Congress provided that defendants who regularly collect debt "owed or due another" are debt collectors, full stop. The obligations of a "debt collector" so defined, are laid out elsewhere. Those provisions apply to a "debt collector" collecting "*any* debt," 15 U.S.C. § 1692e (emphasis added), not any

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[52] Although the Question Presented is tailored most directly to the circuit conflict – in which courts have held that purchasers of defaulted debt are either *always* or *never* debt collectors – it also fairly presents the question whether debt purchasers may be "debt collectors" *sometimes*, as in the circumstances of this case. As the petition emphasized, the Act's provision cannot be construed in isolation, but must be considered in light of the proper understanding of its interconnected matrix of definitions, exceptions, and substantive requirements. *See* Pet. 23-26; Pet. Reply 1-2; *supra* § II.C.3. An issue that "is a predicate to an intelligent resolution of the question presented [is] therefore fairly included therein." *Ohio v. Robinette*, 519 U.S. 33, 38 (1996) (internal quotation marks omitted).

debt "owed or due another." And although Congress provided express exemptions with respect to certain debts "owed or due another" (like debts obtained prior to default) it notably did not provide a general exemption for all debts "owed or due another." *See id.* § 1692a(6)(F).

That decision makes perfect sense. Congress could readily believe that a company that regularly collects others' debts will not distinguish between those debts and those it purchased in deciding how to go about collecting payment.

2. In this case, petitioners allege in their Complaint that Santander was acting as a third-party servicer when it obtained the defaulted debts of the *Thomas* class members. J.A. 23 (Complaint ¶ 47). The servicing of those debts alone is more than sufficient to show that Santander regularly services debts "owed or due another" even on its own interpretation. *See id.* (Complaint ¶ 47) (Santander hired to service *Thomas* class action members' loans); *supra*, at 14 (*Thomas* class action included more than 3,000 members); *Schroyer v. Frankel*, 197 F.3d 1170, 1174 (6th Cir. 1999) ("Debt collection services may be rendered 'regularly' even though these services may amount to a small fraction of the firm's total activity."). Nor is Santander's third-party servicing limited to these loans. *See* Pet. App. 18a-19a (recognizing Santander "as a consumer finance company, lends money, services loans, collects debt for itself, *collects debt for others*, and otherwise engages in borrowing and investing its capital")

(emphasis added).[53] Santander therefore qualifies as a debt collector under the main "regularly collects" definition, and the Act therefore applies to *all* of its collection efforts, including its collection of petitioners' debts. *See supra* § II.C.3.

Accordingly, if the Court decides that a purchased debt is not a debt "owed or due another" within the meaning of Section 1692a(6), it should nonetheless reverse because the Complaint adequately alleges that Santander is a debt collector based on its servicing of other lenders' loans.

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[53] Santander successfully urged the courts below to take judicial notice of its filing with the Securities and Exchange Commission in relation to its purchase of petitioners' debts. *See* Resp't C.A. Br. 56 n.14; Pet. App. 13a. In that filing Santander represented that it "services contracts for third parties." *See* Santander Consumer, Prospectus Supplement (filed pursuant to Rule 424(b)(3)) at S-29 (Dec. 30, 2013), *available at* http://www.sec.gov/Archives/edgar/data/1383094/000119312514000794/d650648d424b3.htm. In another SEC filing, it has represented that its "serviced for others portfolio" was valued at "$11.9 billion as of December 31, 2016." Santander Consumer USA Holdings Inc., Current Report (Form 8-K) at 3 (Jan. 25, 2017), *available at* http://d18rn0p25nwr6d.cloudfront.net/CIK-0001580608/fd109f3d-45be-43ef-a021-47a87d513351.pdf.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

STATUTORY APPENDIX

The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.*, provides in relevant part:

§ 1692. Congressional findings and declaration of purpose

(a) Abusive practices

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws

Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods

Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce

Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from

using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

§ 1692a. Definitions

As used in this subchapter--

(1) The term "**Bureau**" means the Bureau of Consumer Financial Protection.

(2) The term "**communication**" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "**consumer**" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "**creditor**" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "**debt**" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether

or not such obligation has been reduced to judgment.

(6) The term **"debt collector"** means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include--

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the

principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "**location information**" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "**State**" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

§ 1692b. Acquisition of location information

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall--

(1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;

(2) not state that such consumer owes any debt;

(3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;

(4) not communicate by post card;

(5) not use any language or symbol on any envelope or in the contents of any communication effected

by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and

(6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to communication from the debt collector.

§ 1692c. Communication in connection with debt collection

(a) Communication with the consumer generally

Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt--

(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antemeridian and before 9 o'clock

postmeridian, local time at the consumer's location;

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

(b) Communication with third parties

Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

(c) Ceasing communication

If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except--

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) "Consumer" defined

For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

§ 1692d. Harassment or abuse

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.

(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.

(3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 1681a(f) or 1681b(3) of this title.

(4) The advertisement for sale of any debt to coerce payment of the debt.

(5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

(6) Except as provided in section 1692b of this title, the placement of telephone calls without meaningful disclosure of the caller's identity.

§ 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of--

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is

lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to--

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

§ 1692f. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment

instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if--

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

§ 1692g. Validation of debts

(a) Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing--

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the

name and address of the original creditor, if different from the current creditor.

(b) Disputed debts

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this subchapter may continue during the 30-day period referred to in subsection (a) of this section unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

(c) Admission of liability

The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

(d) Legal pleadings

A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a) of this section.

(e) Notice provisions

The sending or delivery of any form or notice which does not relate to the collection of a debt and is expressly required by Title 26, title V of Gramm-Leach-Bliley Act, or any provision of Federal or State law relating to notice of data security breach or privacy, or any regulation prescribed under any such provision of law, shall not be treated as an initial communication in connection with debt collection for purposes of this section.

§ 1692h. Multiple debts

If any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer and, where applicable, shall apply such payment in accordance with the consumer's directions.

§ 1692i. Legal actions by debt collectors

(a) Venue

Any debt collector who brings any legal action on a debt against any consumer shall--

(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or

(2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity--

(A) in which such consumer signed the contract sued upon; or

(B) in which such consumer resides at the commencement of the action.

(b) Authorization of actions

Nothing in this subchapter shall be construed to authorize the bringing of legal actions by debt collectors.

§ 1692j. Furnishing certain deceptive forms

(a) It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.

(b) Any person who violates this section shall be liable to the same extent and in the same manner as a debt collector is liable under section 1692k of this title for failure to comply with a provision of this subchapter.

§ 1692k. Civil liability

(a) Amount of damages

Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of--

(1) any actual damage sustained by such person as a result of such failure;

(2) **(A)** in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) Factors considered by court

In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, among other relevant factors--

(1) in any individual action under subsection (a)(2)(A) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

(2) in any class action under subsection (a)(2)(B) of this section, the frequency and persistence of

noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

(c) Intent

A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) Jurisdiction

An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

(e) Advisory opinions of Bureau

No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Bureau, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

§ 1692l. Administrative enforcement

(a) Federal Trade Commission

The Federal Trade Commission shall be authorized to enforce compliance with this subchapter, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to another Government agency under any of paragraphs (1) through (5) of subsection (b), subject to subtitle B of the Consumer Financial Protection Act of 2010. For purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), a violation of this subchapter shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Federal Trade Commission to enforce compliance by any person with this subchapter, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act, including the power to enforce the provisions of this subchapter, in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.

(b) Applicable provisions of law

Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance with any

requirements imposed under this subchapter shall be enforced under--

(1) section 1818 of Title 12, by the appropriate Federal banking agency, as defined in section 1813(q) of Title 12, with respect to--

(A) national banks, Federal savings associations, and Federal branches and Federal agencies of foreign banks;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act; and

(C) banks and State savings associations insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), and insured State branches of foreign banks;

(2) the Federal Credit Union Act, by the National Credit Union Administration Board with respect to any Federal credit union;

(3) subtitle IV of Title 49, by the Secretary of Transportation, with respect to all carriers

subject to the jurisdiction of the Surface Transportation Board;

(4) part A of subtitle VII of Title 49, by the Secretary of Transportation with respect to any air carrier or any foreign air carrier subject to that part;

(5) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act; and

(6) subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau, with respect to any person subject to this subchapter.

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(c) Agency powers

For the purpose of the exercise by any agency referred to in subsection (b) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b) of this section, each of the agencies referred to in that subsection may

exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter any other authority conferred on it by law, except as provided in subsection (d) of this section.

(d) Rules and regulations

Except as provided in section 5519(a) of Title 12, the Bureau may prescribe rules with respect to the collection of debts by debt collectors, as defined in this subchapter.

§ 1692m. Reports to Congress by the Bureau; views of other Federal agencies

(a) Not later than one year after the effective date of this subchapter and at one-year intervals thereafter, the Bureau shall make reports to the Congress concerning the administration of its functions under this subchapter, including such recommendations as the Bureau deems necessary or appropriate. In addition, each report of the Bureau shall include its assessment of the extent to which compliance with this subchapter is being achieved and a summary of the enforcement actions taken by the Bureau under section 1692l of this title.

(b) In the exercise of its functions under this subchapter, the Bureau may obtain upon request the views of any other Federal agency which exercises enforcement functions under section 1692l of this title.

§ 1692n. Relation to State laws

This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

§ 1692o. Exemption for State regulation

The Bureau shall by regulation exempt from the requirements of this subchapter any class of debt collection practices within any State if the Bureau determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this subchapter, and that there is adequate provision for enforcement.

§ 1692p. Exception for certain bad check enforcement programs operated by private entities

(a) In general

(1) Treatment of certain private entities

Subject to paragraph (2), a private entity shall be excluded from the definition of a debt collector, pursuant to the exception provided in section 1692a(6) of this title, with respect to the operation by the entity of a program described in paragraph (2)(A) under a contract described in paragraph (2)(B).

(2) Conditions of applicability

Paragraph (1) shall apply if--

(A) a State or district attorney establishes, within the jurisdiction of such State or district attorney and with respect to alleged bad check violations that do not involve a check described in subsection (b) of this section, a pretrial diversion program for alleged bad check offenders who agree to participate voluntarily in such program to avoid criminal prosecution;

(B) a private entity, that is subject to an administrative support services contract

with a State or district attorney and operates under the direction, supervision, and control of such State or district attorney, operates the pretrial diversion program described in subparagraph (A); and

(C) in the course of performing duties delegated to it by a State or district attorney under the contract, the private entity referred to in subparagraph (B)--

(i) complies with the penal laws of the State;

(ii) conforms with the terms of the contract and directives of the State or district attorney;

(iii) does not exercise independent prosecutorial discretion;

(iv) contacts any alleged offender referred to in subparagraph (A) for purposes of participating in a program referred to in such paragraph--

(I) only as a result of any determination by the State or district attorney that probable cause of a bad check violation under State penal law exists, and that contact with the alleged offender for

purposes of participation in the program is appropriate; and

(II) the alleged offender has failed to pay the bad check after demand for payment, pursuant to State law, is made for payment of the check amount;

(v) includes as part of an initial written communication with an alleged offender a clear and conspicuous statement that--

(I) the alleged offender may dispute the validity of any alleged bad check violation;

(II) where the alleged offender knows, or has reasonable cause to believe, that the alleged bad check violation is the result of theft or forgery of the check, identity theft, or other fraud that is not the result of the conduct of the alleged offender, the alleged offender may file a crime report with the appropriate law enforcement agency; and

(III) if the alleged offender notifies the private entity or the district attorney in writing, not later than 30 days after being contacted for the first time pursuant to clause (iv),

that there is a dispute pursuant to this subsection, before further restitution efforts are pursued, the district attorney or an employee of the district attorney authorized to make such a determination makes a determination that there is probable cause to believe that a crime has been committed; and

(vi) charges only fees in connection with services under the contract that have been authorized by the contract with the State or district attorney.

(b) Certain checks excluded

A check is described in this subsection if the check involves, or is subsequently found to involve--

(1) a postdated check presented in connection with a payday loan, or other similar transaction, where the payee of the check knew that the issuer had insufficient funds at the time the check was made, drawn, or delivered;

(2) a stop payment order where the issuer acted in good faith and with reasonable cause in stopping payment on the check;

(3) a check dishonored because of an adjustment to the issuer's account by the financial institution holding such account without

providing notice to the person at the time the check was made, drawn, or delivered;

(4) a check for partial payment of a debt where the payee had previously accepted partial payment for such debt;

(5) a check issued by a person who was not competent, or was not of legal age, to enter into a legal contractual obligation at the time the check was made, drawn, or delivered; or

(6) a check issued to pay an obligation arising from a transaction that was illegal in the jurisdiction of the State or district attorney at the time the check was made, drawn, or delivered.

(c) Definitions

For purposes of this section, the following definitions shall apply:

(1) State or district attorney

The term "State or district attorney" means the chief elected or appointed prosecuting attorney in a district, county (as defined in section 2 of title 1, United States Code), municipality, or comparable jurisdiction, including State attorneys general who act as chief elected or appointed prosecuting attorneys in a district, county (as so defined), municipality or comparable jurisdiction, who may be referred to

by a variety of titles such as district attorneys, prosecuting attorneys, commonwealth's attorneys, solicitors, county attorneys, and state's attorneys, and who are responsible for the prosecution of State crimes and violations of jurisdiction-specific local ordinances.

(2) Check

The term "check" has the same meaning as in section 5002(6) of Title 12.

(3) Bad check violation

The term "bad check violation" means a violation of the applicable State criminal law relating to the writing of dishonored checks.

RECORD AND BRIEFS

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In the Supreme Court of the United States

RICKY HENSON, ET AL., PETITIONERS

v.

SANTANDER CONSUMER USA INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

The Fair Debt Collection Practices Act provides that an entity qualifies as a "debt collector" subject to the Act if, *inter alia*, it "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6). The question presented is as follows:

Whether an entity qualifies as a "debt collector" under the foregoing definition when it has purchased a debt portfolio from another entity, including debts that are in default, and is attempting to collect those debts for its own account.

CORPORATE DISCLOSURE STATEMENT

Respondent Santander Consumer USA Inc. is wholly owned by Santander Consumer USA Holdings Inc., a publicly held company. Santander Consumer USA Holdings Inc. has no parent corporation, and Santander Holdings USA, Inc. (a subsidiary of Banco Santander, S.A.), owns 10% or more of its stock.

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Alibrandi v. *Financial Outsourcing Services, Inc.*, 333 F.3d 82 (2d Cir. 2003) 40
Barrett v. *United States*, 423 U.S. 212 (1976) 18
Bridge v. *Ocwen Federal Bank, FSB*, 681 F.3d 355 (6th Cir. 2012) 25
Carter v. *AMC, LLC*, 645 F.3d 840 (7th Cir. 2011) 31, 32
Coulthard v. *Trott & Trott, P.C.*, Civ. No. 12-13601, 2013 WL 12119567 (E.D. Mich. Nov. 25, 2013), *report and recommendation adopted*, 2014 WL 12573975 (Mar. 31, 2014) 46
Dan's City Used Cars, Inc. v. *Pelkey*, 133 S. Ct. 1769 (2013) 36
Davidson v. *Capital One Bank (USA), N.A.*, 797 F.3d 1309 (11th Cir. 2015) 10
Dodd v. *United States*, 545 U.S. 353 (2005) 36
Dole Food Co. v. *Patrickson*, 538 U.S. 468 (2003) 22
Eke v. *FirstBank Florida*, 779 F. Supp. 2d 1354 (S.D. Fla. 2011) 32
Federal Communications Commission v. *AT&T Inc.*, 562 U.S. 397 (2011) 20
Federal Trade Commission v. *Check Investors, Inc.*, 502 F.3d 159 (3d Cir. 2007), cert. denied, 555 U.S. 1011 (2008) 25
Franceschi v. *Mautner-Glick Corp.*, 22 F. Supp. 2d 250 (S.D.N.Y. 1998) 32
Great-West Life & Annuity Insurance Co. v. *Knudson*, 534 U.S. 204 (2002) 18
Heintz v. *Jenkins*, 514 U.S. 291 (1995) 31
Ingalls Shipbuilding, Inc. v. *Director, Office of Workers' Compensation Programs*, 519 U.S. 248 (1997) 21

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Cases—continued:

Jerman v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010) 5
Kirtsaeng v. *John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013) 31
Kramer v. *Time Warner Inc.*, 937 F.2d 767 (2d Cir. 1991) 47
Mertes v. *Devitt*, 734 F. Supp. 872 (W.D. Wis. 1990) 46
Miller v. *BAC Home Loans Servicing, L.P.*, 726 F.3d 717 (5th Cir. 2013) 25
Perry v. *Stewart Title Co.*, 756 F.2d 1197 (5th Cir. 1985) 25
Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989) 22, 23
Puerto Rico v. *Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016) 17
Ruth v. *Triumph Partnerships*, 577 F.3d 790 (7th Cir. 2009) 25
Schlegel v. *Wells Fargo Bank, N.A.*, 720 F.3d 1204 (9th Cir. 2013) 10
Schlosser v. *Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003) 25
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Sebelius v. *Cloer*, 133 S. Ct. 1886 (2013) 24
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12 U.S.C. 5481(6)(A) 41
12 U.S.C. 5531(a) 41
12 U.S.C. 5536(a)(1) 41
Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 31

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Statutes—continued:

Fair Credit Reporting Act, 15 U.S.C. 1681-1681x 41
15 U.S.C. 1681s-2 41
Fair Debt Collection Practices Act,
15 U.S.C. 1692-1692p ..... *passim*
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15 U.S.C. 1692(e) 4
15 U.S.C. 1692a(4) ..... *passim*
15 U.S.C. 1692a(6) ..... *passim*
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15 U.S.C. 1692d 5
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15 U.S.C. 1692*l*(b)(6) 5
Federal Trade Commission Act, 15 U.S.C. 41-58 41
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15 U.S.C. 45(a)(2) 41
Longshore and Harbor Workers' Compensation Act,
33 U.S.C. 901-950 21
33 U.S.C. 933(g)(1) 21
Truth in Lending Act, 15 U.S.C. 1601-1667f 41
15 U.S.C. 1602(f) 20
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18 U.S.C. 922(h) 18

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28 U.S.C. 1254(1) 1
28 U.S.C. 1441(d) 22
28 U.S.C. 1603(b)(2) 22
42 U.S.C. 2000e-2(a) 22
N.H. Rev. Stat. Ann. § 358-C:1 37
W. Va. Code Ann. § 46A-2-122(c) 37
W. Va. Code Ann. § 46A-2-122(d) 37

Miscellaneous:

American Heritage Dictionary of the English Language (4th ed. 2000) 23, 31
Sylvia Chalker & Edmund Weiner, *Oxford Dictionary of English Grammar* (1994) 26
Consumer Financial Protection Bureau, *Ask CFPB—Mortgages* <tinyurl.com/askcfpb> (last visited Mar. 20, 2017) 6
Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2014* (Mar. 2014) <tinyurl.com/2014cfpbannualreport> 6
Consent Decree, *United States* v. *Capital Acquisitions & Management Corp.*, Civ. No. 04-50147 (N.D. Ill. Mar. 24, 2004) <tinyurl.com/capitaldecree> 42
Consent Order, *In re Encore Capital Group, Inc.*, No. 2015-22 (C.F.P.B. Sept. 9, 2015) <tinyurl.com/encoredecree> 42
Consent Order, *In re Portfolio Recovery Associates, LLC*, No. 2015-23 (C.F.P.B. Sept. 9, 2015) <tinyurl.com/portfoliodecree> 42
Federal Trade Commission, *Making Payments to Your Mortgage Servicer* (June 2010) <tinyurl.com/ftcmakingpayments> 6
Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* (Jan. 2013) <tinyurl.com/structureandpractices> ... 6, 43

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Miscellaneous—continued:

Bryan A. Garner, *Garner's Dictionary of Legal Usage* (3d ed. 2011) 17, 23
Bryan A. Garner, *Garner's Modern English Usage* (4th ed. 2016) 17, 26, 27
H.R. Rep. No. 131, 95th Cong., 1st Sess. (1977) 3, 4, 37, 38
Merriam-Webster Dictionary (2005) 23
Merriam-Webster's Collegiate Dictionary (10th ed. 1993) 23
Oxford English Dictionary (2d ed. 1989) 31
Pam Peters, *Cambridge Guide to English Usage* (2004) 26
Restatement (Second) of Contracts § 317(1) (1981) 29
Antonin Scalia & Bryan A. Garner, *Reading Law* (2012) 33
S. Rep. No. 382, 95th Cong., 1st Sess. (1977) ..... *passim*

In the Supreme Court of the United States

No. 16-349

RICKY HENSON, ET AL., PETITIONERS

v.

SANTANDER CONSUMER USA INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 817 F.3d 131. The opinion of the district court (Pet. App. 21a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2016. A petition for rehearing was denied on April 19, 2016 (Pet. App. 41a-42a). The petition for a writ of certiorari was filed on September 16, 2016, and granted on January 13, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fair Debt Collection Practices Act, 15 U.S.C. 1692-1692p, is reproduced in an appendix to petitioners' brief.

STATEMENT

This case presents a straightforward question of statutory interpretation concerning the definition of "debt collector" under the Fair Debt Collection Practices Act (FDCPA). The FDCPA prohibits certain conduct in the collection of debts by a "debt collector." It defines a "debt collector" as any person who, *inter alia*, "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6).

Respondent is a consumer-finance company that purchased a large portfolio of car loans, including loans made to petitioners that were in default. Respondent subsequently attempted to collect petitioners' debts for its own account. As is relevant here, petitioners sued respondent, alleging that it had violated various provisions of the FDCPA in attempting to collect those debts.

Respondent moved to dismiss the complaint on the ground that it was not a "debt collector" under the FDCPA. The district court granted the motion, and the court of appeals affirmed. The court of appeals held that, because respondent owned the debts at issue, it was not attempting to collect debts "owed or due * * * another" and thus could not qualify as a "debt collector" under the foregoing definition. The court of appeals' holding was correct, and its judgment should therefore be affirmed.

A. Background

1. The FDCPA was enacted in 1977 in response to the use of "abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. 1692(a); see Pub. L. No. 95-109, 91 Stat. 874 (1977). The "prime source of egregious collection practices," and thus the "primary persons intended to be covered" by the statute, were "independent debt collectors." S. Rep. No. 382, 95th Cong., 1st Sess. 2, 3 (1977). Independent debt collectors "constitute[d] an industry separate from creditors" because, "[u]nlike creditors, they d[id] not offer to sell any product or service to consumers"; instead, "[their] business [was] the collection of debts." H.R. Rep. No. 131, 95th Cong., 1st Sess. 7 (1977).

While creditors and independent debt collectors alike "collect[ed] * * * overdue accounts," H.R. Rep. No. 131, *supra*, at 7, Congress was particularly concerned about independent debt collectors for two reasons. First, unlike creditors, independent debt collectors "[were] likely to have no future contact with the consumer and often [were] unconcerned with the consumer's opinion of them," making them particularly prone to engage in abusive practices. S. Rep. No. 382, *supra*, at 2.

Second, abusive practices by independent debt collectors had proven difficult to regulate before the FDCPA. Such debt collectors were generally small and short-lived, see S. Rep. No. 382, *supra*, at 2, whereas "[c]reditors * * * [we]re usually larger and more stable," H.R. Rep. No. 131, *supra*, at 7. As a result, "if a Federal agency such as the Federal Trade Commission t[ook] action against a major creditor, it usually ha[d] a deterrent effect throughout the industry." *Ibid.* But that was "not the case" with the debt-collection industry, because "small debt collection agencies * * * [could] easily go out of business after suit by the Commission," such that suing even "15 or

20 individual debt collection agencies d[id] not change industrywide practices." *Ibid.*

When Congress enacted the FDCPA, therefore, it did not simply proscribe certain debt-collection practices; it proscribed those practices only when they were committed by a targeted group of "debt collectors." 15 U.S.C. 1692(e). The FDCPA defines a "debt collector" as any person who falls into one of three categories. First, and most significantly, the FDCPA reaches any person who is engaged in "any business the principal purpose of which is the collection of any debts." 15 U.S.C. 1692a(6). Second, and of relevance here, the FDCPA reaches any person who "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." *Ibid.* And third, the FDCPA reaches "any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts." *Ibid.*[1]

The FDCPA proceeds to exclude certain persons and activities from the foregoing categories of "debt collector." See 15 U.S.C. 1692a(6)(A)-(F). Of particular relevance to petitioners' argument here, the FDCPA provides that "debt collector" does not include "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity * * * concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. 1692a (6)(F)(iii).

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[1] A "creditor," in turn, is "any person who offers or extends credit creating a debt or to whom a debt is owed." 15 U.S.C. 1692a(4). That term excludes "any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." *Ibid.*

The substantive provisions of the FDCPA bar "debt collectors" from engaging in certain conduct. For example, in provisions currently at issue in another case before this Court, the FDCPA prohibits debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt," 15 U.S.C. 1692e, and from using "unfair or unconscionable means to collect or attempt to collect any debt," 15 U.S.C. 1692f. See *Midland Funding, LLC* v. *Johnson*, No. 16-348 (argued Jan. 17, 2017). Each of those provisions proscribes a host of specific practices. See 15 U.S.C. 1692e, 1692f. The FDCPA also prohibits debt collectors from communicating with consumers at particular times or places or in particular manners, see 15 U.S.C. 1692c, 1692d, and from more generally "engag[ing] in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt," 15 U.S.C. 1692d.

The FDCPA may be enforced by the Federal Trade Commission (FTC), the Consumer Financial Protection Bureau (CFPB), or private plaintiffs. See 15 U.S.C. 1692k, 1692*l*(a), 1692*l*(b)(6). The defendant's state of mind is not ordinarily an element of liability under the FDCPA. See 15 U.S.C. 1692k(c). Instead, the statute provides an affirmative defense where a violation "was not intentional and resulted from a bona fide error." *Ibid.*; see *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 584-586 (2010). Successful private plaintiffs are entitled to actual damages and costs, including attorney's fees. See 15 U.S.C. 1692k(a). Regardless of the existence of actual damages, plaintiffs may also receive statutory damages of up to $1,000 in an individual action or up to $500,000 in a class action. See 15 U.S.C. 1692k(a)(2).

2. In the four decades since the FDCPA was enacted, there have naturally been changes in how consumer debt

is held in the United States. In particular, consumer loans are now often bought and sold after origination (that is, after the debt was originally created). See FTC, *The Structure and Practices of the Debt Buying Industry* 12 (Jan. 2013) (*Structure and Practices*) <tinyurl.com/structureandpractices>; FTC, *Making Payments to Your Mortgage Servicer* (June 2010) (*Making Payments*) <tinyurl.com/ftcmakingpayments>.

Most obviously, the originator (the entity that originally extended credit) may transfer ownership of a debt or portfolio of debts. See CFPB, *Fair Debt Collection Practices Act: CFPB Annual Report 2014*, at 7 (Mar. 2014) <tinyurl.com/2014cfpbannualreport>. The purchaser may retain the purchased debts and collect them itself; "place the debts with third-party collectors"; or "resell the debts to other debt buyers." *Ibid.*

Short of a complete transfer of ownership, the originator (or a subsequent owner) may also transfer the right to service the debt. A debt servicer "handles the day-to-day tasks of managing [the] loan," such as processing payments, responding to borrower inquiries, and, in the case of home loans, managing the escrow account. CFPB, *Ask CFPB—Mortgages* <tinyurl.com/askcfpb> (last visited Mar. 20, 2017). As petitioners acknowledge, a debt servicer can acquire the right to service the debt—including the right to collect payments—without acquiring ownership of the underlying debt. See Br. 8 n.9; FTC, *Making Payments*, *supra*.

B. Facts And Procedural History

1. Respondent is a consumer-finance company that specializes in car loans. It is one of the Nation's largest automotive lenders, issuing and servicing thousands of car loans every year. Respondent is indirectly majority-

owned by Banco Santander, one of the world's largest and most respected banks. Pet. App. 28a.

While respondent primarily issues and services car loans directly to consumers or through dealers, it has occasionally acquired portfolios of car loans from other consumer-finance companies; this case arises from one of those acquisitions. As alleged in the complaint, petitioners, four individuals, obtained loans from CitiFinancial Auto to finance car purchases in Maryland and later defaulted. CitiFinancial Auto repossessed and sold petitioners' cars, leaving an outstanding balance on each of their accounts. J.A. 20-22; Pet. App. 5a.

A group of plaintiffs brought a class action against CitiFinancial Auto, claiming that it had violated Maryland law when it conducted certain repossessions. Petitioners were members of the class. The parties to the class action ultimately reached a settlement, under which CitiFinancial Auto agreed to waive the outstanding balances of the class members. J.A. 22-23.

Before the settlement, CitiFinancial Auto had sold respondent a $3.2 billion portfolio of car loans, and it had hired respondent as a servicer for an additional portfolio of car loans, including petitioners'. CitiFinancial Auto later sold respondent an additional $3.55 billion portfolio of car loans, including petitioners'. The portfolio contained not just defaulted loans, such as petitioners', but also non-defaulted loans. Under the terms of the settlement, class members released all claims against CitiFinancial Auto, but retained the right to bring claims against respondent or others arising from any attempts to collect their accounts after respondent had acquired the debt portfolio. J.A. 23; Pet. App. 5a; Resp. C.A. Br. 56.

2. In 2012, petitioners filed a class action against respondent and two third-party debt collectors in the United States District Court for the District of Maryland.

Petitioners alleged that, after respondent purchased their loans, it hired the third-party debt collectors to collect them. Petitioners further alleged that respondent and the third-party debt collectors violated various provisions of the FDCPA by misrepresenting the amounts owed, their authority to collect the debts, and the identity of the debts' owner. J.A. 23-29; Pet. App. 5a-6a.

As is relevant here, respondent moved to dismiss the complaint on the ground that it was not a "debt collector" under the FDCPA. The district court granted the motion. Pet. App. 26a-35a.[2]

The district court began by observing that there was "no plausible allegation" that the "principal purpose" of respondent's business was debt collection, because petitioners had admitted that respondent "issues and services tens of thousands of car loans each year." Pet. App. 28a (internal quotation marks, citation, and emphases omitted). As a result, respondent did not qualify under the first category of "debt collector" in the FDCPA. *Ibid.* The court thus focused on the second statutory category—specifically, on whether respondent "regularly collects or attempts to collect * * * debts owed or due * * * another." *Ibid.*

The district court proceeded to hold that respondent did not qualify as a "debt collector" under that category either. Pet. App. 28a-35a. The court noted that, as alleged by petitioners, respondent had "owned the debt[s] at all times during its collection activities." *Id.* at 30a. The court reasoned that respondent was therefore a creditor "collecting debts in [its] own name[]," rather than a "debt

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[2] The third-party debt collectors also moved to dismiss the complaint; the district court granted the motion as to one of the debt collectors and stayed the case as to the other. Pet. App. 36a-40a. Petitioners did not appeal those rulings.

collector." *Id.* at 27a. The court specifically rejected petitioners' contention that "a debt[] buyer is necessarily a 'debt collector' when [it] acquire[s] debt in default." *Id.* at 32a. The mere allegation that respondent had purchased defaulted debt, the court explained, was insufficient to "create a plausible cause of action." *Id.* at 33a.

3. The court of appeals unanimously affirmed. Pet. App. 1a-20a. It held that petitioners' interpretation of the second category of "debt collector" "ultimately stands in tension with its plain language." *Id.* at 8a.

At the outset, the court of appeals considered and rejected petitioners' contention, based on the exclusion in Section 1692a(6)(F)(iii), that "*the default status of debt* determines whether a purchaser of debt, such as [respondent], is a debt collector." Pet. App. 8a. The court reasoned that such an approach "turns the statutory provision upside down," because it "fail[s] to address whether [respondent] fits under any definition of 'debt collector' before addressing whether the (F)(iii) exclusion applies." *Id.* at 8a, 14a. And under the second category of "debt collector," the court explained, "the default status of a debt has no bearing on whether a person qualifies as a debt collector." *Id.* at 8a. Instead, the critical inquiry is "whether a person collects debt *on behalf of another* or *for its own account*." *Ibid.*

The court of appeals concluded that respondent could not qualify under the second category of "debt collector," because the complaint "specifically and unambiguously" alleged that "the debts that [respondent] was collecting were owed to it, [respondent], not to another." Pet. App. 13a. At that point, "the analysis ends, and the exclusions from the definition of debt collector, on which [petitioners] rely, have no significance." *Id.* at 14a.

The court of appeals also rejected petitioners' contention that the reference in the second category to "debts

owed or due * * * another" was ambiguous because it could refer either to debts that were owed or due another "at the time of the *collection activity*" or to debts that were owed or due another "when they were first *incurred*." Pet. App. 17a. The court reasoned that, "[i]nsofar as Congress was regulating debt-collector conduct, defining the term 'debt collector' to include a person who regularly collects debts owed to another, it had to be referring to debts as they existed *at the time of the conduct* that is subject to regulation." *Id.* at 17a-18a (citing *Davidson* v. *Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1318 (11th Cir. 2015), and *Schlegel* v. *Wells Fargo Bank, N.A.*, 720 F.3d 1204, 1209 (9th Cir. 2013)).

The court of appeals dismissed petitioners' assertion that its interpretation would create an unintended loophole in the FDCPA for entities that purchase debt they previously serviced. Pet. App. 18a-19a. Petitioners had argued that, "because [respondent] had [previously] been a debt collector with respect to their loans, it remained a debt collector after it purchased their loans," as though its status as a "debt collector" were immutable. *Id.* at 18a. But the court reasoned that Congress did not intend to reach an entity when it "acts to collect its own debts." *Id.* at 19a.

The court of appeals also rejected two additional contentions that petitioners no longer advance before this Court. First, the court of appeals rejected the contention that respondent must be a "debt collector" because it did not qualify as a "creditor" under the FDCPA (and because "the two terms * * * are mutually exclusive"). Pet. App. 7a. The court reasoned that respondent did in fact qualify as a "creditor" because it was a person "to whom a debt is owed." *Id.* at 15a-16a (quoting 15 U.S.C. 1692a(4)). Second, the court rejected the contention that the word "another" in the phrase "debts owed or due or

asserted to be owed or due another" was the object only of "asserted to be owed or due" and not of "owed or due." *Id.* at 16a-17a. The court explained that the phrase was a "singular statutory phrase" and that the word "another" thus applied to both types of debts. *Ibid.*

4. The court of appeals subsequently denied rehearing without recorded dissent. Pet. App. 41a-42a.

SUMMARY OF ARGUMENT

I. The court of appeals correctly held that an entity does not qualify as a "debt collector" for purposes of the FDCPA simply by purchasing debts from another entity and then attempting to collect those debts for its own account. The judgment of the court of appeals should therefore be affirmed.

A. The relevant provision of the FDCPA defines a "debt collector" as any person who "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6). As a matter of basic grammar, the phrase "debts owed or due or asserted to be owed or due another" is the object of the present-tense verbs "collects or attempts to collect"; whether the debts are "owed or due or asserted to be owed or due another" should therefore be assessed as of the time of collection or attempted collection.

Petitioners seemingly concede that that is the "most natural" interpretation of the statutory text. If Congress had wanted the assessment of whether a debt is "owed or due * * * another" to be made as of some earlier time (for example, as of the time the debt was originated), it would have had to say so. The foregoing interpretation is also consistent with the Court's statutory-interpretation cases, which make clear, in a variety of contexts, that a

statutorily required status should be assessed as of the time of the principal action in the statute at issue.

A number of other textual cues confirm that the foregoing interpretation is the correct one. The FDCPA repeatedly uses the present tense in similar constructions and elsewhere expressly refers to the originator of a debt (which it conspicuously does not do here). And a contrary interpretation, under which the assessment whether debts are "owed or due * * * another" is made as of the time of origination, would render nonsensical the exclusion in Section 1692a(6)(F)(ii), which protects the originator of a debt from liability for its conduct. It naturally follows that, if the assessment whether debts are "owed or due * * * another" is made as of the time of collection or attempted collection, an entity that has purchased a debt and is attempting to collect it for its own account is attempting to collect a debt owed or due itself, not a debt owed or due another.

B. Petitioners offer a convoluted alternative interpretation that, to the best of our knowledge, no court has ever adopted. According to petitioners, a purchased debt triggers the relevant definition of "debt collector" because it is "owed" to the originator, even if it is simultaneously "due" to the purchaser. But petitioners identify nothing in the statute that suggests the terms "owed" and "due" refer to two different points in time, and the Court should reject that decidedly unnatural interpretation.

If Congress had wanted the assessment whether a debt is "owed" (but not whether a debt is "due") to be made as of the earlier time of origination, it would have had to include additional words to that effect. It did not do so, and the words it did use should be given their natural meaning. No significance should be attached to Congress's use of "owed" instead of the synonymous but ar-

chaic "owing." And there is no support for petitioners' alternative contention that a purchased debt is "presently owed" to the originator even after a sale to another person. Where an entity has purchased a debt and then attempts to collect it for its own account, the debt is presently owed only to that entity.

C. Petitioners contend that their interpretation is necessary to avoid anomalies in other provisions that the plain-text interpretation would purportedly create. But each of those provisions works perfectly well under the plain-text interpretation. Consistent with congressional intent, Section 1692a(6)(F)(iii) excludes debt servicers that seek to collect payment on debts that were not in default when the servicers obtained them, and Section 1692a(6)(F)(iv) excludes secured parties that hold debts as collateral but have not acquired full ownership of the debts. Unlike the first two categories of "debt collector" in the FDCPA, the third category, which concerns a creditor collecting its own debts under a different name, admits of no exceptions. And the FDCPA's definition of "creditor" does not aid petitioners, especially because the terms "creditor" and "debt collector" are not mutually exclusive (as petitioners now concede). None of those other provisions casts any doubt on the plain-text interpretation of the relevant definition of "debt collector," which does not reach debt purchasers such as respondent.

D. Petitioners' policy arguments lack merit and cannot overcome the plain text. Congress carefully delineated who was covered by the FDCPA's substantive provisions, and it focused on a subset of actors who had previously been notoriously difficult to regulate: independent debt collectors. Petitioners cite no evidence—because there is none—that Congress intended to reach purchasers of debt whose principal purpose is something other

than debt collection. The text of the statute belies petitioners' contention that the default status of a debt was Congress's driving concern. Most of the examples of abusive practices that petitioners cite involved entities that qualified under the first category of "debt collector" in the FDCPA, because their principal purpose was debt collection. And entities that engage in abusive practices but are not subject to the FDCPA can be regulated under other statutes. In short, petitioners cite no valid policy justification for deviating from the plain text of the statute, and the Court should adopt the concededly "more natural" interpretation.

II. Finally, the Court should reject petitioners' alternative argument that respondent qualifies as a "debt collector" because it regularly attempts to collect debts it *services* for others. That argument is outside the scope of the question presented, which focused only on whether respondent qualifies as a "debt collector" because it regularly attempts to collect debts it *purchased* from others. Petitioners did not raise that alternative argument in the body of their petition for certiorari or in their principal brief below, and it is therefore not properly before this Court.

In any event, that argument lacks merit. The only allegations in petitioners' complaint concern the particular portfolio of loans at issue here; those allegations are nowhere near sufficient to establish that respondent *regularly* attempts to collect debts it services for others. It would be highly inequitable to permit petitioners to proceed on that insufficiently preserved and insufficiently pleaded theory. On the question they did present, petitioners are obviously incorrect. The court of appeals' judgment should therefore be affirmed.

ARGUMENT

I. AN ENTITY DOES NOT QUALIFY AS A 'DEBT COLLECTOR' UNDER THE FDCPA SIMPLY BY PURCHASING DEBTS FROM ANOTHER ENTITY AND THEN ATTEMPTING TO COLLECT THOSE DEBTS FOR ITS OWN ACCOUNT

This case concerns the scope of the second category of "debt collector" under the FDCPA, which reaches any person who "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6). Plainly, an entity that attempts to collect debts owed or due itself—including debts it previously purchased—is not attempting to collect debts owed or due another.

Remarkably, petitioners seemingly concede that the foregoing interpretation is the "most natural" interpretation of the relevant statutory text. Br. 26-27. Even more remarkably, petitioners now offer an alternative interpretation that they did not offer below (or in their petition for certiorari)—an interpretation so novel that petitioners cannot identify a single court to have adopted it. Under that interpretation, a purchased debt triggers the relevant definition of "debt collector" because it is "owed" to the originator, even if it is simultaneously "due" to the purchaser. That profoundly atextual interpretation rests on purported anomalies that would result from the more natural interpretation and on petitioners' policy views as to how Congress should have written the FDCPA. But there is no valid reason here to deviate from the plainer-than-plain meaning of the statutory text.

The court of appeals correctly held that respondent did not qualify as a "debt collector" simply by purchasing the debt portfolio containing petitioners' loans and then attempting to collect those debts for its own account. The judgment of the court of appeals should be affirmed.

A. Under The Plain Text Of The Relevant Definition Of 'Debt Collector,' An Entity Attempting To Collect A Debt It Owns For Its Own Account Is Not Attempting To Collect A Debt 'Owed Or Due Another'

1. The FDCPA does not apply to all persons who take actions to collect debts, but instead applies only to persons who qualify as "debt collectors." The provision of the FDCPA that defines "debt collector," 15 U.S.C. 1692a(6), has two parts. The first part sets out three categories of persons who qualify as "debt collector[s]" under the statute: (1) any person who is engaged in "any business the principal purpose of which is the collection of any debts"; (2) any person who "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another"; and (3) "any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts." 15 U.S.C. 1692a(6). The second part then excludes certain persons and activities from the definition of "debt collector." See 15 U.S.C. 1692a(6)(A)-(F).

The structure of Section 1692a(6) thus confirms that, in assessing whether a person qualifies as a "debt collector," a court must make two determinations. The court must first determine whether the person falls within one of the three categories in the first part of the provision. If so, the court must then determine whether the person or his activities fall within one of the exclusions in the second part of the provision.

2. The only question properly presented here is whether respondent falls within the second category of "debt collector" on account of its attempts to collect debts it owns. Resolution of that question "begins with the language of the statute itself," and because the statute's language is plain, "that is also where the inquiry should end."

Puerto Rico v. *Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (internal quotation marks and citation omitted). The answer to that question is no, because an entity attempting to collect a debt it owns for its own account is not attempting to collect a debt "owed or due * * * another."

a. The second category of "debt collector" under the FDCPA reaches any person who "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6). As a matter of basic grammar, the phrase "debts owed or due or asserted to be owed or due another" is the object of the present-tense verbs "collects or attempts to collect." The action of which the "debts" are the object—"collects or attempts to collect"—establishes the point in time at which one should assess whether the debts are "owed or due or asserted to be owed or due another." That assessment is thus made as of the time of collection or attempted collection, not as of some unspecified earlier time.

Put another way, the adjectival phrase "owed or due or asserted to be owed or due another" is a "reduced relative clause"—the equivalent of a dependent clause in the same tense as the sentence in which it appears. In the statutory language "collects or attempts to collect * * * debts owed or due or asserted to be owed or due another," "owed or due or asserted to be owed or due another" is simply a shorthand for the slightly wordier phrase "*that are* owed or due or asserted to be owed or due another."[3]

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[3] That is consistent with the grammatical principle of the "sequence of tenses," under which, "[w]hen [a] principal clause has a verb in the present[,] * * * [a] subordinate clause has a present-tense verb" as well. Bryan A. Garner, *Garner's Modern English Usage* 896 (4th ed. 2016); see Bryan A. Garner, *Garner's Dictionary of Legal Usage* 881 (3d ed. 2011) (*Garner's Dictionary*).

For that reason, there is no ambiguity concerning the point in time at which one should assess whether a debt is "owed or due * * * another." If Congress had wanted that assessment to be made as of some earlier time (for example, as of the time the debt was originated), it would have had to include additional words to that effect: for example, by referring to debts "*that had been* owed or due * * * another."[4]

Indeed, if Congress had wanted the second category of "debt collector" to reach any person who regularly attempts to collect debt purchased from an originator (or subsequent owner), it could have referred to debts "*that were originated by* * * * another." Such a definition would have plainly and directly excluded pure originators from the reach of the FDCPA. Because Congress "could simply have said" what it meant, it is "most implausible" to conclude that the words it did use were intended to convey that meaning, rather than their plain meaning. *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204, 218 (2002).

b. A number of other textual cues confirm that the foregoing interpretation is the correct one.

First, the provision at issue covers not just the collection of debts "owed or due * * * another," but also the collection of debts "*asserted to be* owed or due another." 15 U.S.C. 1692a(6) (emphasis added). Congress expressly used the present tense in the latter phrase, reaching debts "asserted *to be* owed or due another" rather than debts "asserted *to have been* owed or due another." Given that

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[4] Cf. *Barrett* v. *United States*, 423 U.S. 212, 216 (1976) (noting that, in 18 U.S.C. 922(h), "the proscribed act, 'to receive any firearm,' is in the present tense," but "the interstate commerce reference ['which has been shipped or transported in interstate or foreign commerce'] is in the present perfect tense, denoting an act that has been completed").

the phrase "asserted to be owed or due another" expressly refers to the time of collection or attempted collection, it would make little sense to construe the phrase "owed or due * * * another" to refer to some earlier time. If Congress had intended that meaning, it was required to communicate that intent affirmatively.

Second, the provision defining the statutory term "creditor" covers "any person who offers or extends credit creating a debt *or to whom a debt is owed.*" 15 U.S.C. 1692a(4) (emphasis added). In the emphasized language, Congress again expressly used the present tense—thus referring, as petitioners concede, to the time of collection or attempted collection, not to the earlier time of origination. See Br. 47-48. That understanding is confirmed by the structure of the definition, which makes clear the person "to whom a debt is owed" may be different from the person "who offers or extends credit creating a debt" (*i.e.*, the originator of the debt). 15 U.S.C. 1692a(4). It would be passing strange if the same debt could be simultaneously "owed" to the purchaser for purposes of the definition of "creditor" but "owed" to the originator for purposes of the definition of "debt collector." The definition of "creditor" thus underscores that, if Congress had wanted the definition of "debt collector" to turn on the status of a debt as of some earlier (and different) time, it would have said so.

Third, one of the FDCPA's substantive provisions requires a debt collector to identify "the creditor to whom the debt is owed" and to inform the consumer of his right to request the name and address of "the original creditor, if different from the current creditor." 15 U.S.C. 1692g (a)(2), (5). That language makes clear that the "current" creditor may differ from the "original" creditor (*i.e.*, the originator), and that the "current" creditor is the person

"to whom the debt is owed." Like the definition of "creditor" discussed above, that language is in considerable tension with any interpretation of the definition of "debt collector" that assesses whether a debt was "owed or due * * * another" as of the earlier time of origination. And it further demonstrates that, when Congress intended to refer to the originator of a debt, it did so expressly.[5] Giving the definition of "debt collector" its plain meaning is thus entirely consistent with the remainder of the statutory scheme.

c. A contrary interpretation of the definition of "debt collector"—under which the assessment whether debts are "owed or due * * * another" is made as of the time of origination—would fail for an additional reason. Such an interpretation would render nonsensical Section 1692a (6)(F)(ii), which excludes from the definition of "debt collector" "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity * * * concerns a debt which was originated by such person." Like the provision at issue, that provision contains the phrase "owed or due * * * another"—and the phrase should be given the same meaning across both provisions. See, *e.g.*, *Federal Communications Commission* v. *AT&T Inc.*, 562 U.S. 397, 408 (2011).

But if the phrase "owed or due * * * another" were read to require an assessment as of the time of origination, the exclusion in Section 1692a(6)(F)(ii) would be a nullity, excluding a person (the originator) that it does not cover in the first place (because the originator was "owed"

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[5] See also 15 U.S.C. 1602(f) (Truth in Lending Act) (defining a "creditor" as any person who both "regularly extends * * * consumer credit" and "is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness").

the debt at the time of origination). By contrast, if the assessment whether debts are "owed or due * * * another" is made as of the time of collection or attempted collection, the exclusion in Section 1692a(6)(F)(ii) makes perfect sense: it protects an originator from liability for its conduct, even if the debt is now "owed or due * * * another" by virtue of an intervening sale or other transaction.

d. This Court's statutory-interpretation cases support the foregoing interpretation of the relevant definition. Most notably, the Court applied materially identical principles of construction in *Ingalls Shipbuilding, Inc.* v. *Director, Office of Workers' Compensation Programs*, 519 U.S. 248 (1997), a case concerning a provision of the Longshore and Harbor Workers' Compensation Act. That provision states that, "[i]f [a] person entitled to compensation * * * enters into a settlement with a third person" for an amount less than the amount to which the person would be entitled under the statute, the person's employer is liable for compensation only if it gave written approval before the settlement. 33 U.S.C. 933(g)(1).

Interpreting that provision, the Court held that "the 'person entitled to compensation' must be so entitled at the time of settlement." *Ingalls Shipbuilding*, 519 U.S. at 255. The Court reasoned that "[t]he plain language of this [provision] reveal[ed]" that proposition, because the principal action in the clause—the present-tense verb phrase "enters into a settlement"—establishes the point in time at which one should assess whether the person is "entitled to compensation." *Ibid.* (internal quotation marks and emphasis omitted). So too here. While "person entitled to compensation" was the subject of the clause, rather than the object, the applicable principle is the same: the timing of the adjectival phrase (there, "entitled to com-

pensation"; here, "owed or due * * * another") is established by the principal action in the clause in which it appears (there, "enters into a settlement"; here, "collects or attempts to collect").

In other cases, the Court has applied similar principles, assessing a statutorily required status as of the time of the principal action in the statute at issue. For example, in *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003), the Court considered the statute governing removal of actions against foreign states, which provides that "[a]ny civil action brought in a State court against a foreign state * * * may be removed by the foreign state" to federal court. 28 U.S.C. 1441(d). A separate provision defines a "foreign state" as, *inter alia*, an instrumentality "a majority of whose shares or other ownership interest is owned by a foreign state." 28 U.S.C. 1603(b)(2). The Court held that whether an instrumentality is a "foreign state" should be determined as of the time of the filing of the action, rather than as of the earlier time of the conduct giving rise to the action. See 538 U.S. at 478. The Court relied on the fact that the definitional provision "is expressed in the present tense," as well as the traditional principle that a court's jurisdiction "depends upon the state of things at the time of the action brought." *Ibid.* (internal quotation marks and citation omitted).

Similarly, in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), the Court considered the provision of Title VII imposing liability on an employer that "fail[s] or refuse[s] to hire," "discharge[s]," or "otherwise * * * discriminate[s] against any individual * * * because of such individual's * * * sex." 42 U.S.C. 2000e-2(a). The plurality concluded that the "critical inquiry" under the provision was "whether gender was a factor in the employment decision *at the moment it was made*." *Price Waterhouse*, 490 U.S. at 241. The plurality cited "[t]he present, active

tense of the operative verbs," which "turns our attention to the actual moment of the event in question, the adverse employment decision." *Id.* at 240-241; see *id.* at 283 (Kennedy, J., dissenting) (agreeing with the foregoing analysis, but disagreeing that the use of the present tense excluded the possibility of but-for causation).

3. Once it is established that the assessment whether debts are "owed or due * * * another" is made as of the time of collection or attempted collection, the only remaining question is whether debts are "owed or due" an entity that has purchased the debts and is attempting to collect them for its own account. They obviously are.

The term "owe" means "to be under obligation to pay or render," or "to be indebted to or for." *Merriam-Webster Dictionary* 355 (2005); see, *e.g.*, *American Heritage Dictionary of the English Language* 1257 (4th ed. 2000) (*American Heritage Dictionary*). And the term "due" means "owed or owing as a debt" or "having reached the date at which payment is required: payable." *Merriam-Webster's Collegiate Dictionary* 357-358 (10th ed. 1993); see, *e.g.*, *American Heritage Dictionary* 553.[6]

A debtor is unambiguously "indebted to" and "under [an] obligation to pay" an entity that has purchased the debt. When the debt was originated, the debtor was indebted to, and under an obligation to pay, the originator. But once the originator sold the debt to another entity, the originator could no longer claim any right to payment. At that point, the debtor becomes indebted to, and under an obligation to pay, the current owner of the debt, not the

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[6] Although often used interchangeably, the terms "owed" and "due" may convey slightly different meanings. A debt that is "owed" (or "owing") may not yet be "due": for example, "a note payable thirty days after date is owing immediately after it is delivered to the payee, but it is not *due* until the thirty days have elapsed." *Garner's Dictionary* 300 (internal quotation marks and citation omitted).

originator. The current owner of the debt is thus the person to whom the debt is owed. Under the second category of "debt collector," therefore, an entity that has purchased a debt and then attempts to collect it for its own account is attempting to collect a debt owed or due itself, not a debt "owed or due * * * another."

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The Court can stop reading here. As the Court has often said, "when [a] statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Sebelius* v. *Cloer*, 133 S. Ct. 1886, 1896 (2013) (internal quotation marks and citation omitted). As a matter of plain language, the second category of "debt collector" under the FDCPA reaches only persons who collect or attempt to collect debts that are owed or due someone else *at the time of collection or attempted collection.* Petitioners seemingly concede that such an interpretation of the statutory text is the "most natural" one, Br. 26-27, and they conspicuously do not contend that such an interpretation is absurd. As we will now explain, petitioners' efforts to concoct and then justify an alternative interpretation are unavailing.

B. Petitioners' Alternative Interpretation Of The Relevant Definition Of 'Debt Collector' Is Contrary To The Plain Text

Petitioners offer a convoluted alternative interpretation of the relevant statutory language that, to the best of our knowledge, no court has ever adopted. According to petitioners, a purchased debt triggers the second category of "debt collector" because it is "owed" to the originator, even if it is simultaneously "due" to the purchaser. See Br. 27-29. Under petitioners' interpretation, the parallel adjectives "owed" and "due" refer to two different

points in time: "due" requires an assessment as of the time of collection or attempted collection, but "owed" requires an assessment as of the earlier time of origination. The Court should reject that head-spinning and decidedly unnatural interpretation.

1. To start with the obvious, petitioners identify nothing in the statute that suggests the terms "owed" and "due" refer to two different points in time. And none of the court of appeals decisions petitioners cite has adopted such an interpretation. See, *e.g.*, *Miller* v. *BAC Home Loans Servicing, L.P.*, 726 F.3d 717, 722-723 & n.5 (5th Cir. 2013); *Bridge* v. *Ocwen Federal Bank, FSB*, 681 F.3d 355, 358-360 (6th Cir. 2012); *Ruth* v. *Triumph Partnerships*, 577 F.3d 790, 796-797 (7th Cir. 2009); *Federal Trade Commission* v. *Check Investors, Inc.*, 502 F.3d 159, 171-174 (3d Cir. 2007), cert. denied, 555 U.S. 1011 (2008); *Schlosser* v. *Fairbanks Capital Corp.*, 323 F.3d 534, 536-539 (7th Cir. 2003); *Perry* v. *Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985).

Petitioners have seemingly devised that interpretation in an effort to avoid some of the problems that would result from an interpretation that assesses whether debt is *both* "owed" *and* "due" as of the time of origination. See pp. 20-21, *supra*.[7] Yet petitioners' interpretation suffers from the same fundamental flaw: it cannot be reconciled with the language and structure of the relevant definition, which makes clear that the assessment whether a debt is

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[7] Indeed, petitioners' interpretation would reach even further, because petitioners would sweep even an originator into the second category of "debt collector" where it regularly attempts to collect debts it had originated but then sold to another. See Br. 33 n.36. Petitioners take that position in an apparent effort to avoid rendering the exclusion in Section 1692a(6)(F)(ii) entirely superfluous. See pp. 20-21, *supra*.

both "owed" and "due" is made as of the time of collection or attempted collection. See pp. 17-20, *supra*.

Again, if Congress had wanted the assessment whether a debt is "owed" (but not whether a debt is "due") to be made as of the earlier time of origination, it would have had to include additional words to that effect: for example, by using the phrase "collects or attempts to collect * * * debts *that had been* owed or *are* due * * * another," or "collects or attempts to collect * * * debts *originally* owed or *presently* due * * * another" (and presumably making similar changes to the parallel phrase "asserted to be owed or due another"). But Congress did not use those words. And the words it did use should be afforded their natural meaning, with "collects or attempts to collect" establishing the point in time at which one should assess whether the debts are "owed or due * * * another."

The sole textual point that petitioners make in support of their interpretation is that Congress used the past participle "owed," rather than the present participle "owing." Br. 28. But that is a distinction without a difference—and, in attempting to draw that distinction, petitioners misapprehend basic principles of grammar. While "owed" is technically a "past" participle, that does not mean it necessarily refers to a previous time. See, *e.g.*, Pam Peters, *Cambridge Guide to English Usage* 409 (2004) (*Cambridge Guide*); Sylvia Chalker & Edmund Weiner, *Oxford Dictionary of English Grammar* 286-287 (1994). As discussed above, "debts owed" is here merely a shorthand for "debts that are owed," see pp. 17-18, and the combination of a past participle and a present-tense form of "to be" constitutes the present tense of the passive voice, see Bryan A. Garner, *Garner's Modern English Usage* 676 (4th ed. 2016) (*Garner's Usage*); *Cambridge Guide* 411.

Moreover, there was good reason for Congress to use "owed" rather than "owing." "Owing" conveys not just the present tense, but also the active voice; one could just as easily refer to a person "owing" an amount (in a transitive sense) as one could refer to an amount "owing" to a creditor (in an intransitive sense). But "owed" equally conveys the latter meaning—and unambiguously conveys *only* that meaning. As one leading usage guide explains, "[a]lthough *owing* in the sense of *owed* is an old and established usage * * *, the more logical course is simply to write *owed* where one means *owed*," because "[t]he active participle [*owing*] may sometimes cause miscues." *Garner's Usage* 666. As the guide further notes, at the time of the FDCPA's enactment, "owed" had already become the more commonly used term for that purpose: "beginning about 1970, the collocation *amount owed to* overtook *amount owing to* in frequency of use in print sources." *Ibid.* There is thus no significance to Congress's use of the more natural and contemporary "owed" rather than the more stilted and archaic "owing"; the term "owed," like the term "due," requires an assessment as of the time of collection or attempted collection.

2. Petitioners' hypotheticals do not help their cause. Petitioners first hypothesize an entity that purchases debt from Wells Fargo and then states to its customer: "[W]e are collecting on a debt you owed Wells Fargo, which we purchased last month. The debt owed Wells Fargo is now due to us." Br. 27. But that hypothetical simply uses verb tenses imprecisely: the second sentence should read, "The debt *that had been* owed Wells Fargo is now due to us." Petitioners try to make up for that imprecision by packing their hypothetical with contrary contextual cues. Thus, they use the past-tense "owed" in the first sentence (in contrast to the present-tense "are collecting") and note that the debt had been "purchased last

month," and they add in the second sentence that the debt "is now due to us." *Ibid.* But there are no corresponding cues in the relevant definition of "debt collector" to suggest that "owed" requires an assessment as of the time of origination, much less that "owed" and "due" refer to two different points in time. The hypothetical illustrates just how far petitioners' interpretation strays from the language that Congress actually used.

In their next hypothetical, petitioners posit a rule that requires applicants for federal jobs to list "all debts owed or due a foreign government." Br. 28. Unlike the relevant definition of "debt collector," however, that hypothetical does not provide the action that is the subject of the clause (and that would thus establish the point in time at which one should assess whether the debts are "owed or due a foreign government"). Suppose the hypothetical rule stated: "You are ineligible for a federal job if you are paying off a debt owed or due a foreign government." It would then be clear that the assessment whether a debt is "owed or due a foreign government" should be made as of the present time, not some unspecified earlier time. Here, the verbs "collects or attempts to collect" supply the requisite reference point: whether a debt is "owed or due" should be assessed as of the time of collection or attempted collection.

In their final hypothetical, petitioners cite the example of a "person who regularly collects artwork owned by celebrities." Br. 28-29. But that hypothetical also uses verb tenses imprecisely: one would instead speak of a "person who regularly collects artwork *that had previously been* owned by celebrities," unless one were speaking euphemistically about an art thief. And even if petitioners' hypothetical were susceptible of an alternative interpretation, it would not support their interpretation of the pro-

vision at issue, which requires reading the parallel adjectives "owed" and "due" to refer to two different points in time.

3. Unable to support the proposition that the term "owed" requires an assessment as of the time of origination, petitioners alternatively contend that purchased debts are "*presently* owed" to the originator, even after a sale to another person. Br. 28. That is plainly incorrect. As a matter both of the law and of common sense, the sale of a debt extinguishes the seller's right to payment from the debtor and transfers that right to the purchaser. See Restatement (Second) of Contracts § 317(1) (1981). Even petitioners do not appear to believe that a debt remains owed to the originator after sale; they assert only that a person might possess such an incorrect "intuition." See Br. 28.

On this point, petitioners cite the Court's decision in *Sprint Communications Co., L.P.* v. *APCC Services, Inc.*, 554 U.S. 269 (2008). That decision, however, involved a partial assignment and is therefore inapposite. *Sprint Communications* concerned billing and collection firms called "aggregators," which were assigned the right to pursue claims against long-distance carriers on behalf of payphone operators (and promised to remit any compensation recovered to the operators). See *id.* at 271-272. The specific question presented in *Sprint Communications* was whether such an aggregator had a sufficient interest to give rise to standing in federal court. See *id.* at 271.

Analyzing the history of such arrangements, the Court noted it had long been recognized that an assignee could possess equitable title to a chose in action while the assignor retained legal title; in other words, title to the claim was not transferred in full to the assignee. See *Sprint*

Communications, 554 U.S. at 276. As the Court explained, the aggregators were "assignees for collection only, *i.e.*, assignees who brought suit to collect money owed to their assignors" and promised to turn the money over after it was collected. *Id.* at 280. The aggregators at issue in *Sprint Communications* may thus have been analogous to debt *servicers*, see p. 32, *infra*, but they were nothing like debt *purchasers*, which acquire full title to debts upon sale and thus leave sellers with no residual rights to any payments the purchasers receive.

Where an entity has purchased a debt and then attempts to collect it for its own account, the debt is presently owed only to that entity. The relevant statutory language does not permit petitioners' alternative interpretation, and the Court should reject it.

C. The Purported Anomalies Petitioners Identify With The Plain-Text Interpretation Are Illusory

Petitioners contend that their jerry-rigged interpretation of the relevant definition of "debt collector" is necessary to avoid anomalies that the plain-text interpretation would purportedly create in other provisions. See Br. 29-33, 44-50. But each of those provisions works perfectly well under an interpretation that assesses whether a debt is "owed or due * * * another" as of the time of collection or attempted collection. There is therefore no valid justification for departing from the plain text here.

1. Petitioners primarily rely on Section 1692a (6)(F)(iii), which excludes from the definition of "debt collector" "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity * * * concerns a debt which was not in default at the time it was obtained by such person." See Br. 29-33. Petitioners argue that, if whether a debt is "owed or due * * * another" is assessed as of

the time of collection or attempted collection, it would render the exclusion nonsensical, because a person who has "obtained" a debt would not be covered in the first place (since the debt would no longer be "owed or due * * * another" after it has been obtained). See Br. 31.

That argument lacks merit because it rests on an incorrect understanding of the meaning of "obtained." Petitioners all but equate "obtaining" a debt with "owning" it outright (after obtaining a complete assignment). See Br. 30-31. But purchasing a debt is "not the only way" to "obtain" it. *Carter* v. *AMC, LLC*, 645 F.3d 840, 844 (7th Cir. 2011). In ordinary English, "obtain" can signify mere possession short of full ownership. See *American Heritage Dictionary* 1214 (4th ed. 2000) (defining "obtain" as "[t]o succeed in gaining possession of as the result of planning or endeavor; acquire"); 10 *Oxford English Dictionary* 669 (2d ed. 1989) (defining "obtain" as "[t]o come into the possession or enjoyment of (something) by one's own effort, or by request").

This Court, too, has recognized that distinction. In *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013), the Court contrasted an earlier version of the Copyright Act that reached "the transfer of any copy of a copyrighted work the possession of which has been *lawfully obtained*" with a later version that reached only the transfer by "the *owner* of a particular copy." *Id.* at 1360 (internal quotation marks, citation, and some emphases omitted). And in *Heintz* v. *Jenkins*, 514 U.S. 291 (1995), the Court used "obtain" in a similarly broad sense in discussing the scope of the FDCPA, noting that a lawyer "regularly tries to *obtain* payment of consumer debts through legal proceedings" (even though the lawyer does not own the underlying payments). *Id.* at 294 (emphasis added).

In Section 1692a(6)(F)(iii), Congress used "obtained" rather than "transferred" (or some other word denoting ownership), and it had good reason to do so. Congress included Section 1692a(6)(F)(iii) for the specific purpose of excluding "mortgage service companies and others who service outstanding debts for others, so long as the debts are not in default when taken for servicing." S. Rep. No. 382, 95th Cong., 1st Sess. 3-4 (1977). As petitioners concede, a debt servicer can acquire the right to collect payments and provide other services without acquiring ownership of the underlying debt. See Br. 8 n.9. In that circumstance, the servicer can be said to have "obtained" the debt, even though the debt remains "owed or due" the owner that hired the servicer. Lower courts have consistently interpreted Section 1692a(6)(F)(iii) in precisely that fashion. See, *e.g.*, *Carter*, 645 F.3d at 843-844; *Eke* v. *FirstBank Florida*, 779 F. Supp. 2d 1354, 1358-1359 (S.D. Fla. 2011); *Franceschi* v. *Mautner-Glick Corp.*, 22 F. Supp. 2d 250, 253-254 (S.D.N.Y. 1998). Under the plain-text interpretation of "debt collector," therefore, not only does Section 1692a(6)(F)(iii) have meaning, it has its intended meaning.

2. Petitioners make a similar argument regarding Section 1692a(6)(F)(iv), which excludes from the definition of "debt collector" "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity * * * concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor." See Br. 29-33. Petitioners argue that such an exclusion would also be nonsensical, because a secured party "'obtains' debts in the same sense as a debt purchaser." Br. 32.

Again, petitioners are incorrect. Congress included Section 1692a(6)(F)(iv) for the specific purpose of excluding "the collection of debts owed to a creditor when the collector is holding the receivable account *as collateral* for commercial credit extended to the creditor." S. Rep. No. 382, *supra*, at 4 (emphasis added). In other words, the exclusion addresses the circumstance in which a creditor uses debt it owns as collateral for a loan from a commercial lender. Much as with a debt servicer, the lender that is the secured party in that transaction "obtains" the debt by holding it as collateral without acquiring full ownership. Under the natural interpretation of "debt collector," therefore, Section 1692a(6)(F)(iv) also has its intended meaning.

3. Petitioners fare no better in attempting to manufacture a problem out of the third category of "debt collector," which provides as follows: "Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term [debt collector] includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts." 15 U.S.C. 1692a(6). Under the plain-text interpretation of "owed or due * * * another," petitioners contend, the "notwithstanding" clause would do no work, because clause (F) applies only to "any person collecting or attempting to collect any debt owed or due * * * another," whereas the third category of the definition applies only to a "creditor * * * *collecting his own* debts." Br. 49-50.

To begin with, "superordinating language," such as the "notwithstanding" clause here, "merely shows which provision prevails in the event of a clash—but does not necessarily denote a clash of provisions." Antonin Scalia & Bryan A. Garner, *Reading Law* 126-127 (2012). As a

result, it would not be problematic if there are no identifiable examples in which the third category of the definition applies but an exclusion provided by clause (F) also applies (thus triggering the "notwithstanding" clause). Congress may have included the "notwithstanding" clause merely to clarify that the third category of "debt collector," unlike the first two, admits of no exceptions.

In any event, it is not hard to posit such an example. As petitioners conspicuously fail to acknowledge, the exclusions provided by clause (F) apply to "any person collecting or attempting to collect" not just "any debt owed or due * * * another," but also "any debt * * * *asserted to be* owed or due another." 15 U.S.C. 1692a(6)(F) (emphasis added). The third category of "debt collector" reaches precisely the circumstance in which a creditor misleadingly asserts that a third party is involved in the transaction. See 15 U.S.C. 1692a(6). The "notwithstanding" clause thus ensures that such a devious creditor remains a "debt collector" even if it could argue that it falls within one of the clause (F) exclusions by dint of its misrepresentation.

4. Petitioners also invoke the FDCPA's definition of "creditor," though it is not entirely clear why. See Br. 46-49. Petitioners argued below that the definition of "creditor" affirmatively supported their interpretation because the terms "creditor" and "debt collector" were mutually exclusive. See Pet. C.A. Br. 12; Pet. C.A. Reply Br. 27. But petitioners now abandon that argument, conceding that the terms are not exclusive. See Br. 47. That concession is prudent, because the definition of "debt collector" does not exclude "creditors" (and in fact makes clear that a "creditor" can qualify as a "debt collector" in certain circumstances). See 15 U.S.C. 1692a(6).

In any event, the "creditor" definition does not aid petitioners here. That provision defines a "creditor" as including "any person who offers or extends credit creating a debt or to whom a debt is owed," but excluding "any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. 1692a(4).

The latter clause is not written as an exception from the category created by the first clause. But even if it were, it would still carve out certain persons who would otherwise be covered by the first part of the definition under a plain-text interpretation of the present-tense phrase "a person * * * to whom a debt is owed." For example, it would exclude persons to whom a debt is assigned or transferred essentially as a sham: that is, "solely for the purpose of facilitating collection" for the previous owner. 15 U.S.C. 1692a(4). And it would also seemingly exclude persons who acquire full ownership of a debt but are obligated under the terms of the transaction to remit collected payments back to the assignor or transferor. In both of those circumstances, the assignee or transferee is receiving the debt "solely for the purpose of facilitating collection * * * for another."[8]

* * * * *

Ultimately, petitioners' tactic in raising each of these supposed anomalies is clear: to distract from the plain language of the definition at issue here and attempt to use exclusions from that definition to drive its meaning. See

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[8] Petitioners' alternative interpretation of the exclusion defies all sense. Petitioners contend that, where an assignee or transferee is collecting debt solely for its own account, it nevertheless falls within the exclusion because it stands in the shoes of the originator and is therefore "facilitating collection of such debt for another" (*i.e.*, itself!). Br. 49. In a brief full of odd interpretations, that one takes the cake.

Br. 50 (relying on the "combined gist" of the exclusions to support petitioners' interpretation). In so doing, however, petitioners entirely invert the process of statutory interpretation. This Court has consistently refused to reason backward from exceptions in that fashion. See, *e.g.*, *Dan's City Used Cars, Inc.* v. *Pelkey*, 133 S. Ct. 1769, 1780 (2013). Congress had no reason to hide the meaning of "debt collector" within the statute's various exclusions in the equivalent of a statutory egg hunt. The relevant definition of "debt collector" in the FDCPA is unambiguous, and debt purchasers such as respondent are outside the statute's ambit.

D. Petitioners' Policy Arguments Lack Merit And Cannot Overcome The Plain Text

Tellingly, petitioners devote far more attention to policy arguments than they do to arguments about the relevant statutory provision. See Br. 33-44, 50-53. And in those sections of their brief, petitioners offer extended musings about how they believe the statute should operate and what purposes it should serve, largely without support. See *ibid.* But the language of the relevant provision is clear, and this Court "must presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Dodd* v. *United States*, 545 U.S. 353, 357 (2005) (internal quotation marks and citation omitted). In any event, petitioners' policy arguments lack merit.

1. As borne out in the statutory text, Congress intended in the FDCPA to proscribe certain debt-collection practices only when they were committed by a specified group of "debt collectors." Congress could have taken a different approach and applied the FDCPA's substantive provisions to any person collecting a consumer debt—as some States have done in their analogous statutes. See,

e.g., W. Va. Code Ann. § 46A-2-122(c), (d) (defining "debt collector" as "any person or organization engaging directly or indirectly" in "any action, conduct, or practice of soliciting claims for collection or in the collection of claims owed or due or alleged to be owed or due by a consumer"); N.H. Rev. Stat. Ann. § 358-C:1 (defining "debt collector" to include "[a]ny person who by any direct or indirect action, conduct or practice enforces or attempts to enforce an obligation that is owed or due, or alleged to be owed or due, by a consumer as a result of a consumer credit transaction").[9]

Instead, Congress carefully delineated who was covered by the FDCPA's substantive provisions. And as discussed above, see pp. 3-4, Congress focused on a subset of actors who had been notoriously difficult to regulate: independent debt collectors. Congress explained that independent debt collectors were the "prime source of egregious collection practices." S. Rep. No. 382, *supra*, at 2; see H.R. Rep. No. 131, 95th Cong., 1st Sess. 7 (1977). Those debt collectors were generally small and short-lived. See S. Rep. No. 382, *supra*, at 2; H.R. Rep. No. 131, *supra*, at 7. And they could "easily go out of business after suit" by federal regulators, with the result that suits against them (unlike suits against larger and more established creditors) "d[id] not change industrywide practices." H.R. Rep. No. 131, *supra*, at 7.

As a result, Congress stated that independent debt collectors were the "primary persons intended to be covered" by the statute, S. Rep. No. 382, *supra*, at 3, and it drafted the definition of "debt collector" accordingly.

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[9] As the amicus States admit, other States are free to enact or amend their own laws to reach more actors and more conduct than the FDCPA if they believe the reach of federal law is insufficient. See States Br. 10-11. The mere fact that some States have chosen not to do so is hardly a reason to distort the meaning of federal law.

That definition primarily covers entities whose "principal purpose" is "the collection of any debts." 15 U.S.C. 1692a(6). To ensure that debt collectors do not escape the reach of the statute simply by having a different "principal purpose," however, the definition also covers entities that "regularly" collect "debts owed or due or asserted to be owed or due another." *Ibid.* Congress expressed the belief that entities "such as banks, retailers, credit unions or finance companies" would not fall within one of those two categories H.R. Rep. No. 131, *supra*, at 4. Respondent—a consumer-finance company that is indirectly majority-owned by one of the world's largest banks—is precisely such an entity.

Indeed, as such a diversified financial institution, respondent is more like a creditor that has an interest in a continuing business relationship with a debtor than a debt collector that lacks such an interest. Respondent's principal activity is not debt collection, but rather lending; it is one of the Nation's largest automotive lenders, issuing and servicing thousands of car loans every year. See pp. 6-7, *supra*. As a result, respondent has a significant interest in maintaining good relationships with its customers so that they will consider using respondent for subsequent car loans, recommending respondent to others, and using or recommending Santander for other financial needs. In that way, financial institutions such as respondent more closely resemble "creditors," which Congress recognized "generally are restrained by the desire to protect their good will when collecting past due accounts," than "independent collectors," which "are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." S. Rep. No. 382, *supra*, at 2.

Petitioners muse at length about whether debt purchasers are actually analogous to debt servicers. See Br.

34-37. But petitioners cite no evidence—because there is none—that Congress intended to reach debt purchasers. Indeed, petitioners admit that the industry for buying defaulted debt did not emerge until after the statute's enactment. See Br. 8. And to the extent that petitioners speculate (again without any support) that debt purchasers have similar incentives to debt servicers, that speculation is ultimately unavailing. Congress included a definition of "debt collector" in the FDCPA, and that definition articulates exactly what characteristics an entity must have to be subject to the statute. The language of the statute is the most accurate reflection of Congress's intent at the time it enacted the FDCPA; if petitioners believe the statute should be extended to a new category of actors, they should direct those arguments to Congress in the first instance.

In any event, it is easy to see why Congress would not have extended the FDCPA to cover entities such as respondent. As petitioners note, once an entity is classified as a "debt collector" under the FDCPA, it becomes subject to a long list of substantive requirements. See Br. 4-5. The expansive interpretation of "debt collector" proposed by petitioners would expose respondent's entire business—and the business of myriad other financial institutions in respondent's position—to the burgeoning cottage industry of FDCPA litigation. That would create incentives for entities such as respondent to avoid purchasing debt (or, at a minimum, to avoid purchasing defaulted debt, even where it is part of a larger debt portfolio)—which could have negative effects on secondary markets and leave debt collectors as the only entities willing to engage in such transactions. That perverse result would surely be contrary to Congress's intent in enacting the FDCPA.

2. Petitioners next contend that, as a policy matter, whether a debt is in default should be talismanic, because, when it comes to defaulted debt, "the incentives for aggressive collection practices are particularly high." Br. 36-37. Again, however, the text of the statute belies the proposition that the default status of a debt was Congress's driving concern. The word "default" appears nowhere in the affirmative definition of "debt collector," but instead appears in only one of the many exclusions from that definition (the exclusion for debt servicers). 15 U.S.C. 1692a(6)(F)(iii). In fact, the word "default" appears in only one other place in the entire statute. See 15 U.S.C. 1692a(4). And the statute does not define "default," which would be highly peculiar if Congress had intended default status to be the predominant factor for determining whether an entity qualifies as a "debt collector."[10] To the contrary, the predominant factors under the statute are, first, whether an entity has the "principal purpose" of engaging in debt collection, and second, whether the entity regularly collects or attempts to collect debts for others.

3. Petitioners also contend that, under the plain-text interpretation, entities could "change their business models" in order to avoid being subject to the FDCPA—whether by diversifying their business practices so that their "principal purpose" is no longer debt collection, or by acquiring full ownership of debts so that they are collecting the debts for their own accounts. Br. 40-41. But even assuming it is likely that entities would be willing to

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[10] Petitioners misleadingly assert that a debt is "generally understood" to be in default within the meaning of the FDCPA "only after a period of persistent nonpayment." Br. 45 n.47. In fact, whether a debt is in default is usually determined by the terms of the applicable agreement. See *Alibrandi* v. *Financial Outsourcing Services, Inc.*, 333 F.3d 82, 87 n.5 (2d Cir. 2003) (per curiam).

make those changes, that possibility is inherent in the system that Congress created, which does not regulate every entity when it engages in debt collection but instead looks to an entity's overall business practices to determine whether it is subject to regulation. And it bears noting that an entity that is not subject to the FDCPA would hardly go unregulated if it engages in abusive practices; it would remain subject to more encompassing statutes such as the Consumer Financial Protection Act of 2010 (Dodd-Frank Act), the Federal Trade Commission Act, the Fair Credit Reporting Act, and the Truth in Lending Act (which specifically applies only to originators of loans).[11]

4. Petitioners conjure up a sparse parade of horribles, citing less than a handful of examples of government enforcement actions against debt purchasers accused of various prohibited practices in collecting debts. See Br.

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[11] See, *e.g.*, 12 U.S.C. 5481(6)(A), 5531(a), 5536(a)(1) (Dodd-Frank Act) (reaching "any person * * * offering or providing a consumer financial product or service" that commits "any unfair, deceptive, or abusive act or practice"); 15 U.S.C. 45(a)(1), (2) (FTC Act) (covering "persons, partnerships, or corporations" that engage in "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce"); 15 U.S.C. 1681s-2 (Fair Credit Reporting Act) (prohibiting any person from "furnish[ing] any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe the information is inaccurate"); 15 U.S.C. 1602(g), 1631 (Truth in Lending Act) (covering any person who both "regularly extends * * * consumer credit" and "is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness," and requiring such creditors to disclose certain information when entering into consumer credit transactions).

37-39.[12] Notably, however, all of the entities at issue appear to qualify under the first category of "debt collector" in the FDCPA, because their "principal purpose" is "the collection of any debts"; indeed, most of those entities appear to have conceded that they qualified as "debt collectors." See Consent Decree, *United States* v. *Capital Acquisitions & Management Corp.*, Civ. No. 04-50147 (N.D. Ill. Mar. 24, 2004) <tinyurl.com/capitaldecree>; Consent Order, *In re Encore Capital Group, Inc.*, No. 2015-22 (C.F.P.B. Sept. 9, 2015) <tinyurl.com/encoredecree>; Consent Order, *In re Portfolio Recovery Associates, LLC*, No. 2015-23 (C.F.P.B. Sept. 9, 2015) <tinyurl.com/portfoliodecree>.

Petitioners seemingly acknowledge that examples of similar misconduct by entities whose principal purpose is *not* debt collection are few and far between. See Br. 50-51. That is not surprising. As petitioners' own amici recognize, to the extent a secondary market has developed for buying and selling portfolios of defaulted debt, that market is "dominated by" entities whose principal purpose is debt collection, Public Counsel Br. 11; as a result, "[t]he vast segment of the debt industry that exists solely to purchase and collect debt * * * should remain untouched" by a ruling in respondent's favor, NCLC Br. 33 n.10. There is thus no valid justification to rewrite the second category of "debt collector" to reach those few debt

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[12] Significantly, the government has not filed a brief in support of petitioners, despite the heavy reliance by petitioners and their amici on prior government statements. See, *e.g.*, Pet. Br. 12-13; Yale Law School Br. 21-36. To the extent those statements seemingly embraced a more expansive interpretation of the relevant definition of "debt collector," those statements were made outside the rulemaking context, and such an interpretation is inconsistent with the plain text of the statute. Those statements would thus not warrant deference.

purchasers that do not qualify under the first category, but engage in abusive practices that could be regulated under other statutes.[13]

Indeed, respondent's acquisition of the loan portfolio at issue here bears no resemblance to the transactions taking place on the secondary market for defaulted debt. On that market, buyers acquire debt that is generally so far past delinquent that it is unlikely to be collected, and they acquire the debt at a deep discount for precisely that reason. See FTC, *Structure and Practices* ii, 13. This transaction, by contrast, was an arm's-length one between two large diversified financial institutions, each primarily focused on their own consumer-lending operations. Respondent acquired CitiFinancial Auto's debt portfolio totaling $3.55 billion, which included both non-defaulted and defaulted debt, and it incorporated CitiFinancial's auto-loan business into its own existing auto-loan business. See Resp. C.A. Br. 56. And the complaint contains no specific allegation that respondent acquired the portfolio at issue for pennies on the dollar. There is no reason to think that a financial institution such as respondent was the type of actor Congress sought to regulate when it enacted the FDCPA—and good reason to think otherwise. See pp. 36-39, *supra*.

5. Finally, petitioners contend that an interpretation that assesses whether a debt is "owed or due * * * another" as of the time of collection or attempted collection would "exempt only a random slice of companies that regularly collect purchased defaulted debt." Br. 42-44. But that appears to be a quibble with the statute as written:

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[13] Petitioners correctly concede that, because respondent is a consumer-finance company specializing in automotive lending, its "principal purpose" is not debt collection. See Br. 16 n.31; Pet. App. 28a.

specifically, with the undisputed proposition that "a company's status as a 'debt collector' under the main definitions turns on its general business model[,] * * * not the particulars of any given debt." Br. 42-43. Unlike the affirmative definitions of "debt collector," the exclusions provided by clause (F) are triggered only where an entity is "collecting or attempting to collect" a *particular* "debt owed or due * * * another." To the extent that structure creates an "anomalous gap," it has nothing to do with the question presented here. Br. 42. It is simply a consequence of the different way in which Congress drafted the affirmative definitions (categorically for certain persons) and the exclusions (specifically for certain activities).

* * * * *

In short, there is no valid policy justification for deviating from the plain text of the statute. The court of appeals correctly held that, because respondent owned the debts at issue, it was not attempting to collect debts "owed or due * * * another" and thus could not qualify under the second category of "debt collector" in the FDCPA. The judgment of the court of appeals should therefore be affirmed.[14]

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[14] Even if petitioners were correct that whether a debt is "owed or due * * * another" should be assessed as of the time of origination, it would not follow that respondent necessarily qualifies as a "debt collector." That is because petitioners would still have to show that respondent "*regularly* * * * attempts to collect" such debts. 15 U.S.C. 1692a(6) (emphasis added). Tracking a generic allegation in their complaint, see J.A. 16, petitioners' original question presented asserted that respondent "*is in the business* of purchasing defaulted debt for pennies on the dollar then attempting to collect on that debt from the defaulting consumer." Pet. i (emphasis added). But that assertion was utterly unfounded: the complaint contains no allega-

II. THE COURT SHOULD REJECT PETITIONERS' ALTERNATIVE ARGUMENT THAT RESPONDENT QUALIFIES AS A 'DEBT COLLECTOR' BECAUSE IT REGULARLY SERVICES DEBTS FOR OTHERS

In an effort to salvage something from this case, petitioners contend in the alternative that, even if respondent does not qualify as a "debt collector" because it attempts to collect debts it *purchased* from others, it still qualifies as a "debt collector" because it regularly attempts to collect debts it *services* for others. See Br. 53-56. That contention is both forfeited and meritless.

A. As a preliminary matter, petitioners' alternative argument for reversal is not within the scope of the question presented in their petition for certiorari: namely, "[w]hether a company that regularly attempts to collect debts *it purchased after the debts had fallen into default* is a 'debt collector' subject to the [FDCPA]." Pet. i (emphasis added). That question could not be more discrete from the question whether a company that regularly attempts to collect debts *it services for others* qualifies as a "debt collector"; there is no sense in which the latter question is either fairly included within, or predicate to the resolution of, the former question. Nor did petitioners make any reference to their alternative argument in the body of their petition for certiorari or in their principal brief before the court of appeals. By any measure, therefore, that argument is not properly before this Court.

B. In any event, petitioners' alternative argument fails on the merits. Petitioners contend that respondent

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tions concerning respondent's business practices beyond the particular portfolio of loans at issue here, and, as noted above, it contains no specific allegation that the respondent acquired the portfolio at issue for pennies on the dollar either. See J.A. 13-36; p. 43, *supra*; pp. 47-48, *infra*. Tellingly, petitioners delete that assertion from the question presented in their merits brief. See Br. i.

qualifies as a "debt collector" because it "regularly collects debts owed others as part of its third-party debt servicing practice." Br. 53-54. But the allegations in petitioners' complaint are nowhere near sufficient to establish that proposition.

1. As discussed above, an entity falls within the second category of "debt collector" if it "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6). This Court has not interpreted the meaning of the term "regularly" in that provision. Consistent with its ordinary meaning, however, lower courts have held that whether an entity "regularly" collects or attempts to collect debts owed or due another turns on whether it does so "as a matter of course" or "as a substantial * * * part" of its business, taking into account the frequency and proportion of such activity in relation to the entity's business more generally. *Schroyer* v. *Frankel*, 197 F.3d 1170, 1176 (6th Cir. 1999); see, *e.g.*, *Absolute Power System, Inc.* v. *Cummins, Inc.*, Civ. No. 15-8539, 2016 WL 6897782, at *8 (D.N.J. Nov. 23, 2016); *Mertes* v. *Devitt*, 734 F. Supp. 872, 874 (W.D. Wis. 1990). Isolated or occasional collection activity involving debts owed or due another is insufficient. See, *e.g.*, *Strasters* v. *Weinstein & Riley PS*, 500 Fed. Appx. 682, 683 (9th Cir. 2012); *Coulthard* v. *Trott & Trott, P.C.*, Civ. No. 12-13601, 2013 WL 12119567, at *5 (E.D. Mich. Nov. 25, 2013), *report and recommendation adopted*, 2014 WL 12573975, at *4 (Mar. 31, 2014).

Such an approach complements the first category of "debt collector," which similarly takes into account an entity's overall business practices. And it accords with Congress's stated purpose in including the term "regularly" in the second category. See S. Rep. No. 382, *supra*, at 3 (noting that "[t]he requirement that debt collection be done 'regularly' would exclude a person who collects a

debt for another in an isolated instance, but would include those who collect for others in the regular course of business").

2. The complaint in this case does not come close to alleging that respondent regularly attempts to collect debts it services for others. The only allegations in the complaint concern the particular portfolio of loans at issue here. With regard to servicing, the complaint alleges only that, before purchasing the debts, "[respondent] was hired by CitiFinancial Auto as a servicer to collect on [the] * * * defaulted accounts" of petitioners (and other class members). J.A. 23. That hardly suffices to establish that respondent collects debts it services for others "as a matter of course" or "as a substantial * * * part" of its business, as the statute requires. *Schroyer*, 197 F.3d at 1176.

Faced with the obvious deficiencies in their complaint, petitioners cite materials outside the complaint to support the proposition that respondent regularly engages in other third-party servicing. See Br. 55-56 & n.53.[15] But while a court can take judicial notice of certain types of documents even at the motion-to-dismiss stage, a court may not use such documents to supply allegations that the complaint itself entirely lacks. Cf. *Kramer* v. *Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (permitting judicial notice of Securities and Exchange Commission filings at the motion-to-dismiss stage "not to prove the truth

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[15] Petitioners also cite the court of appeals' opinion for the proposition that respondent regularly attempts to collect debts it services for others. See Br. 55. In the cited passage, however, the court of appeals merely set out the functions of a consumer-finance company "such as" respondent—and listed "collect[ing] debt for others" as one of those (many) functions. Pet. App. 18a-19a. That is hardly support for the specific factual proposition that respondent regularly attempts to collect debts it services for others.

of their contents but only to determine what the documents stated"). Petitioners' eleventh-hour resort to outside materials amounts to a concession that they failed to set out in their complaint well-pleaded facts establishing that respondent is a "debt collector" on their alternative theory. The Court should not rescue petitioners from their failure to preserve that theory below or to advance it in their petition for certiorari.

Before this Court, petitioners placed all of their eggs in one basket, arguing that respondent qualified as a "debt collector" simply because it purchased debts from another entity and then attempted to collect those debts for its own account. But an entity that collects debts owed or due itself is not collecting "debts owed or due * * * another." That unremarkable proposition is all the Court need accept in order to affirm the court of appeals' judgment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

RICKY HENSON, IAN MATTHEW GLOVER, KAREN PACOULOUTE, F/K/A KAREN WELCOME KUTEYI, AND PAULETTE HOUSE,

Petitioners,

v.

SANTANDER CONSUMER USA INC.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

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REPLY BRIEF OF PETITIONERS

Santander insists that by using the phrase "debts owed or due another," Congress unambiguously excluded debt buyers from the "regularly collects" definition of a "debt collector" in the Fair Debt Collection Practices Act (FDCPA). Respondent does not seriously claim that Congress actually foresaw those words having that effect. Indeed, its brief goes a long way toward showing why this language was not designed to exclude debt buyers. Respondent explains that the "regularly collects" definition was added to "ensure that debt collectors do not escape the reach of the statute simply by having a different 'principal purpose.'" Resp. Br. 38. But simply adding coverage of those who "regularly collect" debts would have swept in banks and other credit originators collecting on their own loans. The "owed or due another" language was added to address that concern. *See id.* There is no indication that Congress intended the phrase also to exclude those who participated in a debt buying industry that, respondent acknowledges, "did not emerge until after the statute's enactment." *Id.* 39.

Instead, respondent suggests that the exclusion of debt buyers is the unavoidable consequence of the language Congress selected to solve a different problem. *See id.* 29. That is wrong for two related reasons. First, as our opening brief demonstrated, the phrase "owed or due another," even read in isolation, does not compel respondent's interpretation. Second, even though the debt buying industry had not yet emerged at the time of enactment, debt buyers are nothing more than a particular kind of debt assignee. And Congress *did*

specifically think about how to treat assignees of debt originated by others. It provided exceptions from the general "debt collector" definition for some, but not all, assignees. Those exceptions would be unnecessary, and internally incoherent, if assignees were already excluded because they collect debts "owed or due" only themselves within the meaning of the statute. Respondent's efforts to find some other function for those exceptions are unconvincing. At the very least, its view requires the Court to give the language of the exceptions a "decidedly unnatural interpretation." *Id.* 12.

In addition to its substantial textual problems, respondent's interpretation creates an irrational pattern of coverage Congress could not have intended. Santander does not dispute that it was a debt collector subject to the Act when it was hired to service petitioners' defaulted debt. Moreover, it conspicuously declines to contest petitioners' showing that the Act continued to apply after Santander bought the debts, so long as it also regularly collected debts for others (as it has told the Securities and Exchange Commission it does). *See id.* 43-44; *infra* § IV. At the same time, respondent seeks to assure the Court that a great many other purchasers of defaulted debt are covered under the "principal purpose" definition. Resp. Br. 41-42. It insists only that a debt purchaser sufficiently diversified to avoid regulation under the "principal purpose" definition, yet not so diversified as to be servicing others debts, is unambiguously outside the Act.

Respondent cannot explain why Congress would have intended such a hodge-podge of a statute. It does not identify anything that happened when it

purchased petitioners' debt that would have been relevant to the reasons Congress had for including or excluding particular entities from FDCPA coverage. Nor can it identify any reason why Congress would have intended to regulate Santander's collection of purchased debt so long as it continued to service debt for others, but not a minute longer.

In the end, the FDCPA is not a model of drafting precision. No one is able to offer the Court an interpretation which gives every term and provision its most natural meaning. But the interpretation adopted by the majority of circuits and the agencies that administer the statute offers by far the best reconciliation of the various provisions of the text, the rationale driving Congress's decision about the statute's scope, and the Act's underlying purposes.

I. The Definition Of "Debt Collector" Encompasses Purchasers Of Defaulted Debt.

Although respondent offers a plausible interpretation of the phrase "debts owed or due another" standing in isolation, the broader text of the "debt collector" definition, read as a whole, is best understood to encompass companies like Santander collecting purchased debt originated by others.

A. "Debts Owed Or Due Another" Can Refer To Debts Originated By Another.

Our opening brief demonstrated that as a matter of common usage, the phrase "debts owed or due another" is ambiguous. It could mean "debts *that are*

owed or *are* due another" or it could mean "debts *that were* owed or *are* due another," or some other permutation of these possibilities.[1]

1. Respondent's principal response is that Congress removed any ambiguity by making "debts owed or due another" the direct object of present-tense transitive verbs ("collects" and "attempts to collect"). But there is no rule of grammar to that effect, as can be easily demonstrated by comparing the statutory text to a few examples:

a. "[a] person . . . who regularly collects . . . debts owed . . . another." 15 U.S.C. § 1692a(6).

b. "a person who regularly collects *debts created* by another."

c. "a person who regularly collects *debts owed or owing* another."

d. "a library that lists *books banned* by its school board."

e. "an applicant who discloses every *debt owed* a foreign creditor."

f. "a person who regularly visits *homes owned* by celebrities."

In example (b), although the verb is in the present tense, the direct object phrase "debts created by another" necessarily refers to debts created in the past. In example (c), context dictates that "owed" must refer to the past, even though the "collects" is in

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[1] It is also possible to speak of an assigned debt as still presently "owed" the originator. Petr. Br. 27-28.

the present tense.[2] Even without similar contextual cues, example (d) could easily refer to books that were previously banned but no longer are, as might happen if the list were part of an exhibit about censorship. Verb tense fails to dictate the meaning of the other examples as well.

Respondent says that such examples use language "imprecisely." Resp. Br. 27, 28. But that's the point. The examples duplicate the imprecision of the statutory language. Because they are ambiguous, it is no surprise that respondent can offer suggestions for rephrasing such examples, and the statutory text, in ways that more clearly direct the reader to an earlier time frame. *Id.* 18, 26-28. Congress could have referred to "debts *that had been* owed or *are* due another," as respondent suggests. *Id.* 26. But it also could have referred to "debts *that are* owed or due" another. *See* 15 U.S.C. § 1692a(4) (definition of "creditor" referring to a person to whom a "debt *is* owed" (emphasis added)). The question is which more specific formulation would Congress have chosen? Grammar alone does not provide the answer.

Respondent also accuses petitioners of "packing their hypothetical with contrary contextual cues." Resp. Br. 27. But as shown above, even without such context, grammar does not dictate respondent's result. Moreover, the point of the examples is to

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[2] If the example seems awkwardly worded, it is because "owing to" is somewhat archaic, not because the sentence is ungrammatical. One might avoid the awkwardness be changing "owed or *owing to* another" to, say, "owed or *due* another."

illustrate that the phrase "debts owed . . . another" is *capable* of referring to a debt previously owed another, and that this can be the *best* interpretation in the right context. The point of the rest of our brief was that the statute provides that context in this case.

2. Respondent claims that it would be "decidedly unnatural" for the phrase "owed or due another" to refer to different time frames. Resp. Br. 12. But there would be nothing unnatural, for example, in Congress targeting debts "owed or owing another" to ensure broad coverage. That is the effect of the language it chose.

Nor is it unnatural for two different words, separated by the disjunctive "or," to have two different meanings and functions in a statutory provision. *See, e.g.*, *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (words connected by "or" almost always "are to be given separate meanings" (citation omitted)). It is respondent who asks this Court to reach the unnatural conclusion that "owed" and "due" are completely duplicative. Respondent observes that a debt may be "owed" but not yet "due," Resp. Br. 23 n.6, yet offers no explanation of how a debt collector could ever be collecting a debt that is presently owed, but not yet due, without at least asserting that the debt is presently "due."

B. Only Petitioners' Interpretation Can Be Reconciled With Congress's Use Of The Identical Language Elsewhere In The Same Definition.

The best textual cue that respondent's interpretation is not correct is that it cannot be

reconciled with Congress's use of the identical language in Clause (F) of the "debt collector" definition. Petr. Br. § II.B.

Examining how the same language is used in the same definition does not amount to "reason[ing] backward from exceptions." Resp. Br. 36. Respondent acknowledges that the FDCPA's exceptions use the exact same language as the principal definition, and that both uses must be given the same meaning. Resp. Br. 20. The Court must therefore decide which interpretation best suits *both* uses. Santander's request that the Court stop reading its brief before it even addresses Clause (F), *id.* 24, defies settled principles of statutory construction. "Whether the language of a statute is plain or ambiguous is determined 'by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Nat'l Fed'n of Fed. Emps., Local 1309 v. Dep't of Interior*, 526 U.S. 86, 101 (1999) (citation omitted). Even when an interpretation of a phrase "may be plausible in the abstract, . . . it [can] ultimately [be] inconsistent with both the text and context of the statute as a whole." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016).

Adhering to those principles, this Court has regularly decided that what at first appears the "most natural reading" of statutory language is, in fact, incorrect given the "language and design of the statute as a whole." *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) (citation omitted); *see, e.g.*, *Yates v. United States*, 135 S. Ct. 1074, 1081-82 (2015) (holding that a fish is not a "tangible object"); *Small v. United States*, 544 U.S. 385, 388-89 (2005) ("any

court" does not include foreign courts); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (ban on retaliation against an "employee" protects a former employee).

Accordingly, while it makes sense to "[b]egin by reading the statute from the top," the Court must "read on," even if respondent would prefer that it did not. *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014).

1. Clause (F)(iv) And Secured Commercial Creditors

Clause (F)(iv) provides an exemption for a person collecting a debt "owed or due another" to the extent such activity

> concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

15 U.S.C. § 1692a(6)(F)(iv).

In our opening brief, we explained that the secured party targeted by this exception collects a consumer debt by foreclosing on a security interest in debts owed its commercial borrower, after which it is collecting on its own account, the same as any debt buyer. Petr. Br. 31-32. Santander responds that the clause is aimed at protecting a secured creditor when it "'obtains' the [consumer] debt by holding it as collateral without acquiring full ownership." Resp. Br. 33. That argument fails for two fundamental reasons.

First, a lender does not "obtain" consumer debt used as collateral for a commercial loan. Instead, it simply gains a security interest in the debts, an

interest that provides no more than an inchoate right to collect the debts if the loan is defaulted and the security interest foreclosed upon. *See* U.C.C. §§ 9-404, 9-406(a), 9-607(a) (AM. LAW INST. & UNIF. LAW COMM'N 2010).[3] Just as a contractor does not "obtain" a house when it puts a mechanic's lien on the property, a commercial lender does not "obtain" consumer debt simply by having a security interest in it.

Second, Clause (F)(iv) does not apply in any event unless the secured creditor is "collecting or attempting to collect" the obtained consumer debt. 15 U.S.C. § 1692a(6)(F). And a creditor who is simply holding a debt as collateral will not be collecting on it. The creditor collects debt from consumers only after default, by providing the consumer "a notification . . . that the amount due or to become due has been assigned and that the payment is to be made to the assignee." U.C.C. § 9-406(a); *see also id.* § 9-406(c) ("[I]f requested by the account debtor, an assignee shall seasonably furnish reasonable proof that the assignment has been made."). At that point, the secured creditor is in the same position as a debt buyer, exercising an assignment in order to collect the funds on its own account. *Id.* § 9-608(a)(1)(B), (a)(4); *see also, e.g.*, *Bank of Waunakee v. Rochester*

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[3] *See also, e.g.*, *Friedman v. Textron Fin. Corp.*, No. 96-C-7983, 1997 WL 467175 (N.D. Ill. Aug. 12, 1997); Teri Dobbins Baxter, *Secured Party's Liability for Collection or Enforcement of Account Debtor's Obligation When Secured Party Has No Right of Recourse Against the Debtor*, 63 CONSUMER FIN. L.Q. REP. 225, 225-26 (2009).

Cheese Sales, Inc., 906 F.2d 1185, 1190 (7th Cir. 1990) (recognizing that "a secured party who exercises his rights to collect on an 'assignor's' accounts receivable [is] an assignee").[4]

Thus, we can think of no situation, and Santander identifies none, in which a secured commercial creditor would ever need the Clause (F)(iv) exception under respondent's interpretation of the main definition, because a secured commercial creditor would never be collecting a debt "owed or due another" as respondent interprets that phrase.

2. *Clause (F)(iii) And Those Who "Obtain" A Debt Before Default*

Clause (F)(iii) presents respondent a similar dilemma. *See* Petr. Br. 29-31. Santander responds again by insisting on an unnatural interpretation of what it means to "obtain" a debt which, even if accepted, does not solve its problem.

Respondent argues that the Clause (F)(iii) exception is directed at debt servicers who "obtain" a debt by entering into a contract to collect a debt on behalf of the creditor. Resp. Br. 31-32. Even if that were right, it is not enough for respondent to convince the Court that Clause (F)(iii) *includes*

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[4] A commercial borrower may also assign the creditor its accounts at the outset. *See* U.C.C. § 9-607 cmt. 4. But when that happens, the secured creditor will, again, be collecting the consumer debt on its own account, crediting the proceeds against the commercial loan. *See, e.g.*, RICHARD F. DUNCAN ET AL., LAW AND PRACTICE OF SECURED TRANSACTIONS: WORKING WITH ARTICLE 9 § 1.06 (2017); 1 JEFFREY J. WONG ET AL., COMMERCIAL FINANCE GUIDE § 6.02.

servicers who have nothing more than a contract to collect a debt; to avoid our objection, respondent must convince the Court that Clause (F)(iii) includes *only* such contract servicers and *excludes* servicers who are collecting on the basis of an actual assignment. Otherwise, if respondent admits that Congress intended the provision to apply to servicers with assignments, then it has to explain how a servicer with an assignment can be collecting a debt "owed or due another" (as required for Clause (F) to apply), yet a debt purchaser, who has also obtained a debt through assignment, is *not* collecting a debt "owed or due another."

Although we emphasized this point in our brief, Petr. Br. 46, respondent offers no response. It does not deny that the exception covers servicers with assignments. Indeed, how could it? A servicer much more obviously "obtains" a debt through assignment than through a contract. In addition, any claim that "obtain" has a narrower meaning would run headlong into the fact that the same word in Clause (F)(iv) *must* include secured creditors collecting on the basis of an assignment, as that is the only means through which secured creditors will ever collect consumer debt. *See supra* § I.B.1.

In any event, respondent's interpretation of "obtained" is strained, to say the least. While it may be that "obtain" can, in general, "signify mere possession short of full ownership," Resp. Br. 31, respondent does not explain how it makes sense to speak of merely "possessing" a debt. A debt is an "obligation of a consumer to pay money." 15 U.S.C. § 1692a(5). It is not a physical thing that can be merely possessed without owning it, like a leased

film. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1360-61 (2013). Indeed, if "possessing" and "owning" a debt provide exactly the same right – *i.e.*, the right to demand payment on the debt – and nothing else, it is hard to see how respondent's distinction helps it.

Respondent's only support for its reading is a citation to the legislative history (an odd source of authority for a party that has spent most of its brief insisting the case can be resolved on the plain language). *See* Resp. Br. 32. But the cited statement in the Senate Report does not say that the servicers it had in mind were collecting on a contract rather than through an assignment. And the *text* of the statute suggests that Congress intended to include servicers who obtain debts through assignment. *See* Petr. Br. 30 (discussing reference to servicers with assignments in "creditor" definition).

At the same time, interpreting Clause (F)(iii) to cover those with nothing more than a contract to collect a debt could open a gaping hole in the FDCPA's coverage. Respondent does not deny that under its interpretation, ordinary third-party debt collectors "obtain" every debt they are hired to collect. *See* Petr. Br. 45. As a result, they would be excluded from FDCPA coverage so long as they are hired to collect the debt before it goes into default. Importantly, delinquent debts are often sent out for collection before they fall into default. *See Alibrandi v. Fin. Outsourcing Servs., Inc.*, 333 F.3d 82, 86-87 (2d Cir. 2003) (noting that while the statute does not define "default," the courts "have repeatedly distinguished between a debt that is in default and a debt that is merely" delinquent, such that "all agree

that default does not occur until well after a debt becomes outstanding"); Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. LEGIS. 41, 49-52 (2015) (describing collection practices).

At the same time, particularly in the credit card industry, debts are generally sold not long after being declared in default. *See id.* at 52. On respondent's interpretation, then, it is possible that *none* of the efforts to collect some credit card debts would be subject to the FDPCA: the originator's attempts are obviously not covered; a third-party debt collector's initial attempts to collect the merely delinquent account will be shielded by Clause (F)(iii); and once the account is declared in default and sold to a debt buyer like Santander, the buyer's attempts would be excluded under respondent's interpretation of "owed or due another."

C. Respondent's Other Textual Arguments Are Unpersuasive.

Respondent points to a handful of other textual cues that it says establish its position as unambiguously correct, but none of them do.

1. The "Asserted To Be" Clause Does Not Compel Respondent's Reading.

Respondent points out that the main "debt collector" definition "covers not just the collection of debts 'owed or due * * * another,' but also the collection of debts '*asserted to be* owed or due another.'" Resp. Br. 18 (emphasis in original).

Respondent reads too much into too little. The function of this clause is to ensure coverage of debt collectors who are dunning the wrong person, or

seeking to collect a debt that has already been paid or extinguished in bankruptcy. *See, e.g.*, *Bridge v. Ocwen Fed. Bank, FSB*, 681 F.3d 355, 361 (6th Cir. 2012). The focus thus is on the assertion that the debt is "owed or due," not that it is owed or due "another." It was unnecessary for Congress to use an unwieldy formulation like "asserted to be, or have been, owed or due another" to achieve the clause's purpose: regardless of what they tell consumers, assignees collecting their own debts will always be covered by the main clause, as they will always be "attempting to collect debts owed or due . . . another," as we interpret the phrase, because the underlying loan will have been originated by someone else.

2. Clause (F)(ii) Makes Perfect Sense Under Petitioners' Interpretation.

Respondent says that an interpretation "under which the assessment whether debts are 'owed or due * * * another' is made as of the time of origination" renders Clause (F)(ii)'s exception for debt originators nonsensical. Resp. Br. 20-21. But we do not argue that *both* "owed" and "due" refer to the time of origination, only that "owed" can. *See id.* 24-25 (acknowledging that position). On that understanding, Clause (F)(ii) has the perfectly sensible function of exempting an originator that sold a debt but continues to service the loan. *See* Petr. Brief. 33 n.36.

3. The "Creditor" Definition Does Not Help Respondent.

In its merits brief, respondent abandons the suggestion, raised in its opposition, that it is exempt from FDCPA coverage so long as it qualifies as a

"creditor." *See* Resp. Br. 34-35; BIO 21-22. It nonetheless argues that it would be "passing strange" for the "creditor" definition to refer to the entity to whom a debt presently *is* owed, yet the debt collector definition to refer to the entity to whom a debt *was* owed. Petr. Br. 19. But given that the two provisions use different language – "*is* owed" v. just "owed" – it is not surprising that they would have different meanings. Moreover, we have explained why Congress would want the creditor definition to refer to a different time frame, given the variety of purposes it serves in the statute. *Id.* 47-48.

II. Respondent's Interpretation Is Inconsistent With The Act's Overall Structure And Scheme.

Respondent's interpretation also cannot be reconciled with Congress's treatment of other similarly situated collectors of consumer debt and leaves an anomalous gap in coverage Congress could not have intended.

A. Purchasers Of Defaulted Debt Are Materially Indistinguishable From Covered Servicers Assigned Defaulted Debt.

Respondent does not dispute that Congress intended to regulate debt servicers who obtain defaulted debt on assignment. *See* Resp. Br. 32. Our opening brief asked the reasonable question why Congress would have intended to include servicers who are *given* an assignment of defaulted debt by their customers, yet exclude those who *purchase* an assignment of the same defaulted debt. After all, the only difference is in the financial arrangements

between the assignor and assignee, which has no obvious bearing on whether the debt is "owed or due another." *See* Petr. Br. 36.

Tellingly, respondent offers no meaningful response. It simply observes that Congress couldn't have had a specific intent about debt purchasers (because the industry did not yet exist) and then returns to its claim that the statutory language unambiguously excludes them. Resp. Br. 38-39.

Respondent *does* attempt to explain why Congress would have been unconcerned about consumer finance companies buying and collecting defaulted debt. *Id.* 38-39. But, of course, Santander asks for a rule that would exempt all debt purchasers, including hedge funds, law firms, and others who regularly collect defaulted debt from individuals with whom they have no interest in maintaining good relations.[5] In any event, Congress expressly contemplated enforcement against financial services companies. *See* 15 U.S.C. § 1692*l*(b)(1) (assigning to specific federal banking regulators responsibility for enforcing FDCPA against various financial institutions); Nat'l Consumer Law Center Br. 17-20.

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[5] *See, e.g.*, Fed. Trade Comm'n, The Structure and Practices of the Debt Buying Industry 15 & n.73 (Jan. 2013) ("*Structure and Practices*"); Jake Halpern, *Paper Boys: Inside the Dark, Labyrinthine, and Extremely Lucrative World of Consumer Debt Collection*, N.Y. TIMES MAG. (Aug. 15, 2014), https://nyti.ms/2jRQHU6.

B. Respondent's Interpretation Yields An Irrational Patchwork Of Coverage Congress Could Not Have Intended.

On respondent's telling, Congress should have exempted all purchasers of defaulted debt, so long as they maintain other lines of business as well. After all, such entities are not the small independent debt collectors Congress had in mind, Resp. Br. 37, each has "a significant interest in maintaining good relationships" with consumers, *id.* 38, and could be deterred from buying defaulted debt if its collection efforts were subject to federal regulation, *id.* at 39. Yet, respondent ultimately does not dispute that under its interpretation, many regular collectors of purchased defaulted debt *are* subject to the FDCPA, even when collecting purchased debt on their own accounts.

That is, respondent insists that many debt buyers are covered by the "principal purpose" definition. *Id.* 41-42. And it does not contest petitioners' showing that the statute also covers a company (like Santander) that regularly services other companies' loans in addition to collecting purchased debt on its own account, even when it is collecting on defaulted debt it owns. *See* Petr. Br. 53-56; Resp. Br. 43-48 (refusing to defend the court of appeal's contrary holding, Pet. App. 19a).

That concession renders respondent's interpretation untenable. Santander offers no cogent explanation why Congress would have intended to exclude *only* the slice of the industry its interpretation actually exempts. Why would Congress be more suspicious of Santander than a hedge fund like Blackstone Group? Or put

differently, why would Congress feel the need to protect consumers from every debt buyer *except* one that regularly (but not principally) collects purchased defaulted debt while refraining from the regular servicing of others' loans? Respondent cannot say.

At the same time, respondent's interpretation creates inexplicable disparities in treatment between "principal purpose" and more diversified "regularly collects" purchasers of defaulted debt. In particular, respondent would deny "principal purpose" companies access to any of the Clause (F) exceptions when collecting purchased debt (because the exceptions apply only when one is collecting a debt "owed or due another"), including the exception for collecting debt obtained prior to default.

It is far more likely that Congress intended petitioners' construction, which results in coverage for *all* regular collectors of purchased debt and provides all debt buyers equal access to the Clause (F) exceptions.

III. Respondent's Interpretation Cannot Be Reconciled With The Statute's Purposes.

Respondent's attempts to reconcile its interpretation with the Act's purposes fail for other reasons as well.

1. Respondent says that some debt buyers have a general business reputation to maintain, which might constrain their collection activities. Resp. Br. 38. But that is true of any business falling under the "regularly collects" definition. Yet Congress plainly believed that general reputational interests were insufficient protection. Congress focused instead on whether a collector had an interest in maintaining a

good relationship with an *existing customer*. Petr. Br. 34-35.

2. Respondent tells the Court not to worry about leaving debt purchasers out of the "regularly collects" definition, because the worst of the lot will be covered by the "principal purpose" definition anyway. Resp. Br. 41-42.[6] There is no basis to believe Congress shared Santander's faith in companies that regularly collect debt, without it being their principal business. *See, e.g.*, Petr. Br. 51 (giving examples of abusive conduct by such entities); Jerome N. Frank Legal Services Org. Br. §§ I.A-I.B (same). The government agencies with the most direct knowledge of the industry certainly have not shared respondent's assessment: for more than twenty years, in both Democratic and Republican administrations, these agencies have construed the statute to encompass all who buy and collect defaulted debt. Petr. Br. 12-13; Nat'l Consumer Law Center Br. 24-28.[7]

Moreover, at the time of enactment, Congress's principal experience with collection of assigned debt

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[6] While we agree that debt purchasers can fall under the "principal purpose" definition, this Court has never so held and the conclusion could be contested. Unlike the independent debt collectors Congress most obviously had in mind, debt buyers do more than simply collect debts – they also put substantial effort into finding, evaluating, and buying debts, as well as repackaging and reselling debts. *See Structure and Practices*, *supra*, at 11, 19-22.

[7] Although the Acting Solicitor General has elected not to file a brief in this case, respondent points to nothing indicating the independent agencies that administer the FDCPA have changed their views. *See* Resp. Br. 42 n.12.

was through the debt servicing industry. Based on that experience, Congress decided to regulate servicers of defaulted debt, whether that was their principal purpose or merely a regular part of their business. Respondent fails to explain why Congress would have been less worried about purchasers of assignments than servicers with assignments.

3. Respondent next claims that applying the FDCPA to debt buyers would discourage debt buying, harming the secondary debt market. Resp. Br. 39. But Santander fails to explain why, if that is so, Congress subjected major portions of the debt buying industry to the Act, including some its largest participants. *See id.* 42.

In any event, petitioners' interpretation has been the law in many circuits for more than a decade, during which time debt buying has grown explosively. *See* Petr. Br. 8, 12. That is unsurprising. Applying the Act broadly avoids distorting the secondary debt market by leveling the playing field between debt buyers who are constrained by law or ethics to avoid abusive collection practices and those who would be left to their own devices on respondent's interpretation. Petr. Br. 40-42.

Santander's claim that our view would "expose respondent's entire business" to "FDCPA litigation," is also wrong. Resp. Br. 39. Clause (F)(ii) expressly excludes collection of debts Santander originated, while Clause (F)(iii) excludes any debt not in default when obtained. That leaves only debts Santander obtained while in default. Subjecting those collections to the FDCPA simply puts Santander in the same position as it was in when it was servicing

the same debts for CitiAuto Financial, and in the same position it all but admits it is in now, having purchased the debts but continued to regularly service loans for others. *See infra* § IV.

Nonetheless, if Santander wishes to avoid having to comply with the FDCPA it can simply refrain from buying or collecting defaulted consumer debt. The Chamber of Commerce cites no support of its claim that it is "difficult, if not impossible" for a bank to avoid buying defaulted debt in large portfolio purchases. Chamber Br. 13-14. In fact, such scrutiny of portfolios is routine in the debt buying industry. *See Structure and Practices*, *supra*, at 17-22 (describing how portfolios are structured by sellers and scrutinized in detail by potential buyers in order to decide what to pay).[8] At the very least, purchasers must give *some* scrutiny to particular accounts before attempting to collect on them. They can easily elect either to not collect a debt obtained after default (which often is not worth much anyway) or resell it to others.

Finally, respondent states that "an entity that is not subject to the FDCPA would hardly go unregulated if it engages in abusive practices." Resp. Br. 41 (citing statutes). But Congress enacted the FDCPA precisely because it concluded that "[e]xisting laws and procedures for redressing" abusive debt collection practices "are inadequate to protect consumers." 15 U.S.C. § 1692(b); States Br. § C;

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[8] The Court need not decide the FDCPA consequence of a company's merger or mere change in the ownership, which is far from obvious.

Public Counsel Br. § C. Congress thus specifically contemplated applying the Act to debt collectors (including financial institutions) *in addition* to other laws. *See supra*, at 16; *see also* 15 U.S.C. § 1692*l*(a) (authorizing Federal Trade Commission to enforce FDCPA as a *supplement* to powers under the Federal Trade Commission Act).

IV. Purchasers Of Defaulted Debt Are Debt Collectors At Least When They Regularly Service Others' Loans.

Even if this Court agrees with respondent's interpretation of "owed or due another," it should reverse because respondent does not dispute that the Fourth Circuit erred in rejecting petitioners' claim that Santander could nonetheless be covered by virtue of its regular collection of others' debts as a third-party servicer. *See* Petr. Br. § IV; Resp. Br. 43-44, 46-48 (refusing to defend Fourth Circuit's interpretation).

1. Whether purchasers of defaulted debt are debt collectors at least when they regularly service others' loans is a "predicate to an intelligent resolution of the question presented" and is "therefore fairly included therein." *Ohio v. Robinette*, 519 U.S. 33, 38 (1996) (internal quotation marks and citation omitted).[9] Deciding whether Santander's construction of "owed or due another" is correct

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[9] While we did not address the question in the body of our petition, we did raise, and the Fourth Circuit decided, the question below. *See* Pet. App. 18a-19a.

requires examining the consequences of that interpretation for the way the statute would operate as a whole, including whether it excises only a discrete subset of debt purchasers in a manner that bears no sensible relation to the Act's underlying rationale and purposes.

At the same time, if the Court holds that purchased debt is not debt "owed or due another," providing an incomplete answer to the Question Presented risks giving lower courts the impression that collectors of purchased defaulted debt are *never* debt collectors, when the reality may be that most *are*.

Because the statute's application to debt purchasers who regularly service others' loans is clear on the face of the statute, uncontested, and an important part of answering the Question Presented by the petition, the Court should address the issue and, if necessary, reverse on the basis of its answer.

2. Having effectively conceded that it would qualify as a "debt collector" if it regularly serviced debts for others, respondent urges the Court to nonetheless affirm on the alternative ground that the Complaint inadequately alleges that third-party servicing was a "regular" part of its business. Resp. Br. 45-48.

That, however, is not an adequate ground for affirming dismissal with prejudice. Respondent does not dispute that, in fact, it "regularly" collects others' debts under any definition of that term, for good reason: it has represented to the SEC that third-party servicing is an $11.9 billion part of its business. *See* Petr. Br. 56 n.53. Accordingly, any pleading

deficiency should lead, at most, to dismissal without prejudice and an opportunity to replead. *See, e.g.*, *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Because the Fourth Circuit did not pass on respondent's pleading objection, the Court could remand the case to allow the court of appeals to address it in the first instance. *See, e.g.*, *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 135 S. Ct. 1318, 1333 (2015). But the Court could also reject it out of hand.[10] On its face, the Complaint alleges that Santander was a third-party servicer for the *Thomas* class members' loans. The docket for that case (before the same district court that heard this one) indicates that the *Thomas* class included about 3,000 members. Petr. Br. 55. Respondent has further represented to this Court that the *Thomas* members' loans were part of a larger portfolio of loans it was hired to service. Resp. Br. 7. Servicing that portfolio easily qualifies as a "regular" part of Santander's business under the authorities respondent cites. *See id.* 46. Finally, the Court can take judicial notice of the aforementioned SEC filing, which substantiates the Complaint's allegation that respondent is a covered debt collector. *See* Complaint ¶19-20 (JA 18-19).

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[10] Santander did not assert any such pleading deficiency in its brief in opposition, even though that would have provided a reason to deny certiorari under *any* construction of the Question Presented. *See* Resp. Br. 44. n.14; BIO 9-30. Accordingly, the Court may deem the objection waived. *See* S. Ct. R. 15.2.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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April 3, 2017

RECORD
AND
BRIEFS

No. 16-349

Supreme Court of the United States

RICKY HENSON, ET AL.,

Petitioners,

v.

SANTANDER CONSUMER USA INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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United States v. ACB Sales & Serv., Inc.,
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Volden v. Innovative Fin. Sys.,
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15 U.S.C. § 1692f 6

15 U.S.C. § 1692k(a) 6

Fair Debt Collection Practices Act ..... *passim*

National Bank Act 14

Other Authorities

ACA International, *The Impact of Third-Party Debt Collection on the U.S. National and State Economies in 2013* (2014) 17

Adams, Josh, ACA International White Paper, *The Role of Third-Party Debt Collection in the U.S. Economy* 2 (Jan. 2016), http://www.acainternational.org/assets/research-statistics/aca-wp-role3rdparty.pdf 17

Farfan, Barbara, "Retail Stores with Credit Card Loyalty Incentives," The Balance (Aug. 12, 2016), https://www.thebalance.com/which-retail-stores-have-credit-card-offers-2892559 14

Hobbs, Robert J., *Fair Debt Collection* § 4.2.5 (8th ed. 2014) 6

Konsko, Lindsay, "Why Are Retailers Dumping Their Credit Cards?," Nerdwallet (June 10, 2014), https://www.nerdwallet.com/blog/credit-cards/retailers-dumping-credit-cards-target-macys-nordstrom/ 14

S. Rep. No. 95-382 7

Williams, Fred O., "What to Do When Your Retail Store Card Switches Banks," CreditCards.com, http://www.creditcards.com/credit-card-news/retail-store-card-changes-banks-1267.php 15

BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND REVERSAL

Interest of the *Amicus Curiae*[1]

ACA International, the Association of Credit and Collection Professionals, is a not-for-profit corporation based in Minneapolis, Minnesota. Founded in 1939, ACA brings together nearly 3,400 member organizations and their more than 300,000 employees worldwide, including third-party collection agencies, asset buyers, attorneys, creditors, and vendor affiliates. ACA produces a wide variety of products, services, and publications, including educational and compliance-related information; and articulates the value of the credit-and-collection industry to businesses, policymakers, and consumers. ACA regularly files briefs as an amicus curiae in cases of interest to its membership.

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[1]No counsel for any Party authored this brief in whole or in part. Neither any such counsel nor any Party made a monetary contribution intended to fund this brief's preparation or submission. No person (other than Amicus Curiae ACA International, its members, and its counsel) made such a monetary contribution.

All the Parties have granted their written consent under Rule 37.3(a) for ACA International to file an *amicus curiae* brief.

ACA's members include sole proprietorships, partnerships, and corporations ranging from small businesses to firms that employ thousands of workers. These members include the very smallest of businesses, which operate within a limited geographic range of a single state; and the very largest of multinational corporations, which operate in every state and outside the United States.[2] About three-quarters of ACA's company members have fewer than 25 employees. ACA helps its members serve their communities and meet the challenges created by changing markets through leadership, education, and service.

ACA's members also help governments in recovering unpaid obligations — a function that is increasingly important as many governments face record budget deficits.

The national credit economy depends on the credit-and-collection industry, whose efficient operation depends on a secondary market in hard-to-collect debt. ACA is the trade association for the credit-and-collection industry, and its members make that secondary market possible because they acquire and service the hard-to-collect debts issued and sold by national banks.

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[2]Respondent NCB Management Services, Inc., is an ACA member.

Summary of Argument

The Fair Debt Collection Practices Act contains numerous requirements and prohibitions, which apply only to debt collectors. More to the point, civil liability under the Act covers only "any *debt collector* who fails to comply," and does not extend to anyone who is not a "debt collector."[3] The Act defines a "creditor" as "any person who offers or extends credit creating a debt *or to whom a debt is owed.*"[4] Thus, a "creditor" within the Act's meaning need not be the original creditor — the "person who offers or extends credit creating a debt" — but may also be the person "to whom a debt is owed" at some point after the original offer or extension of credit. While Santander was not the original creditor, Santander stepped into the original creditor's shoes when it obtained the subject debts.

The Petitioners' taxonomy of "players in the consumer-credit and debt-collection markets" ignores many "players" to whom the Fair Debt Collection Practices Act has historically not been applied, but whom the Petitioners' interpretation would sweep into the Act. For example, the sale of a debt by a loan originator to a debt buyer is not the only means by which a debt's ownership passes from one creditor to a successor creditor; it is also common for a loan originator to cease to exist, or at

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[3] 15 U.S.C. § 1692k(a) (civil liability) (emphasis added).

[4] 15 U.S.C. § 1692a(4) (emphasis added).

least to change its corporate form, as a result of an internal restructuring within a corporate parent, or of the loan originator's acquisition by a different company — in which case the loan itself is not sold as such, but passes to the successor creditor along with the loan originator's other assets and liabilities. Under the Petitioners' interpretation, the successor creditor has become a "debt collector" under the Act with respect to any loan that was in default (but not with respect to other loans that were not in default at the moment of the sale). Likewise, sometimes a loan originator gets out of the business of lending money, and outsources that function to a new lender. Under the Petitioners' interpretation, each such bank would become a "debt collector" with respect to any credit-card account in default at the moment of transfer. In each example, the lender in whose hands the debt ends up is not the loan originator — but neither is it a debt servicer, or a third-party debt collector, or a debt buyer; it is a successor creditor, who steps into the loan originator's shoes in the ordinary course of business. As first-party creditors, collecting their own debt in their own name, the Act has never been applied to successor creditors. But the Petitioners' interpretation would reclassify them as "debt collectors" within the Act's meaning, at least with respect to any debt that was even momentarily in default when they acquired it.

The national credit economy depends on the credit-and-collection industry, whose efficient operation depends on a secondary market in hard-

to-collect debt, which maximizes recovery from that debt and thereby keeps interest rates down. That secondary market lets a lender sell hard-to-collect debt to debt buyers who are willing to assume the burden and risk of collecting on that debt, and whose resources are better aligned with the collection of such debt and whose experience lets them collect on that debt more efficiently. The Petitioners' interpretation would depress that market by subjecting potential successor creditors — particularly successor creditors who are acquiring debt that is not in default — to costly litigation over their hitherto entirely lawful collection practices. A reversal of the Fourth Circuit's decision will make debt less attractive to debt buyers, and will therefore disadvantage lenders in managing their hard-to-collect debt.

Argument

I. Congress excluded creditors from liability under the Fair Debt Collection Practices Act, and Santander was a creditor with respect to the subject debts.

The Fair Debt Collection Practices Act contains numerous requirements and prohibitions, which apply only to debt collectors.[5] More to the

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[5]For example, the Act provides that "a *debt collector* may not communicate with a consumer in connection with the

point, civil liability under the Act covers only "any *debt collector* who fails to comply," and does not extend to anyone who is not a "debt collector."[6] Creditors "are not covered by the Act,"[7] since they

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collection of any debt" except under certain restrictions. 15 U.S.C. § 1692c(a) (communications in connection with debt collection) (emphasis added). "A *debt collector* may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of any debt." 15 U.S.C. § 1692d (harassment or abuse) (emphasis added). "A *debt collector* may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e (false or misleading representations) (emphasis added). "A *debt collector* may not use unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. § 1692f (unfair practices) (emphasis added).

[6] 15 U.S.C. § 1692k(a) (civil liability) (emphasis added); *Schaffhauser v. Citibank (S.D.) N.A.*, 340 F. App'x 128, 130 n.4 (3d Cir. 2009) ("The FDCPA's provisions generally apply only to debt collectors." (citing *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 403 (3d Cir. 2000)); *FTC v. Check Investors, Inc.*, 502 F.3d 159, 171 (3d Cir. 2007) (citing *Pollice*).

[7] *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir. 2003); *accord Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1313 (11th Cir. 2015) ("§ 1692e applies only to debt collectors"); *Schaffhauser*, 340 F. App'x at 130 n.4 ("Creditors — as opposed to 'debt collectors' — generally are not subject to the FDCPA." (quoting *Pollice*, 225 F.3d at 403)); Robert J. Hobbs, *Fair Debt Collection* § 4.2.5 at 119 (8th ed. 2014) ("Creditors are generally exempt from FDCPA coverage."); *see also United States v. ACB Sales & Serv., Inc.*, 590 F. Supp. 561, 576 (D. Ariz. 1984) (rejecting

"generally are restrained by the desire to protect their good will when collecting past due accounts."[8] Thus, "[a]n entity that may collect on a debt owned by and owed to it in the course of doing business falls outside of the Act's intended scope."[9]

The Fair Debt Collection Practices Act defines both "creditor" and "debt collector." The two definitions are similar in that they each contain a substantive requirement, followed by an exclusion to the substantive definition that depends on whether the subject debt is in default when obtained:

> The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, *but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of*

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argument "that the FDCPA unfairly discriminates against independent debt collectors" because others "such as the actual creditor or his lawyer, are not regulated by the Act").

[8] S. Rep. No. 95-382, at 2 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *quoted in Schlosser*, 323 F.3d at 536.

[9] *Davidson v. Capital one Bank (USA), N.A.*, 797 F.3d 1309, 1316 n. 8 (11th Cir. 2015) (citing S. Rep. No. 95-382, at 2–3).

facilitating collection of such debt for another.[10]

The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . . The term does not include—

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . (iii) concerns *a debt which was not in default at the time it was obtained by such person* . . . .[11]

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[10] 15 U.S.C. § 1692a(4) (emphasis added).

[11] 15 U.S.C. § 1692a(6) (emphasis added).

But for each definition, the default-status exclusion comes into play only if the substantive definition is already satisfied.[12]

The Act defines a "creditor" as "any person who offers or extends credit creating a debt *or to whom a debt is owed.*"[13] Thus, a "creditor" within the Act's meaning need not be the original creditor — the "person who offers or extends credit creating a debt" — but may also be the person "to whom a debt is owed" at some point after the original offer or extension of credit.

The definition of "debt collector" reinforces this conclusion. Santander is not a business "the principal purpose of which is the collection of any debts." And Santander does not "regularly collect[] or attempt[] to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." Santander therefore does not satisfy the substantive definition of "debt collector." The exclusion is therefore irrelevant.

While Santander was not the original creditor, Santander stepped into the original creditor's shoes when it obtained the subject debts.

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[12] *Davidson*, 797 F.3d at 1314 ("However, where a person does not fall within subsection (F) or any one of the six statutory exclusions, he is not deemed a 'debt collector' as a matter of course. Before a person can qualify as a 'debt collector' under the FDCPA, he must satisfy the Act's substantive requirements.").

[13] 15 U.S.C. § 1692a(4) (emphasis added).

Santander became the "person . . . to whom a debt is owed," and therefore satisfies the substantive definition of "creditor." Santander did not "receive[] an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another," and therefore does not fall within the definition's exclusion.

The Petitioners argue that "[u]ntil recently, the lower courts uniformly [held] that debt buyers are 'debt collectors' to the extent that they are collecting debt obtained while in default . . . ." But the Petitioners are often misreading these cases. Most lower-court cases that reached the Petitioners' desired result either found that the defendants were not debt collectors,[14] or were analyzing

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[14] *See Miller v. BAC Home Loans Servicing, L.P.*, 726 F.3d 717, 722 (5th Cir. 2013) (affirming dismissal where "the magistrate judge concluded that BAC was not a debt collector, and thus was not subject to the FDCPA because, on the Millers' pleadings, BAC already had acquired the mortgage when the Millers defaulted on it); *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 106 (6th Cir. 1996) ("We turn now to the question whether Credit Acceptance itself came within the statutory definition of a 'debt collector.' The district court held that it did not. We agree."); *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985) ("In this case, the FDCPA is inapplicable, since neither Hammond nor FNMA are debt collectors."); *see also Spreitzer v. Deutsche Bank Nat'l Trust Co.*, 610 F. App'x. 737, 742 (10th Cir. 2015) (affirming dismissal where "[t]he district court concluded Spreitzer's FDCPA claims failed because the Bank Defendants are not "debt collectors" within the meaning of the FDCPA.").

whether the defendant fell within the default-status exclusion only after finding that the person collecting the debt satisfied the substantive definition of "debt collector."[15]

Santander does not satisfy the substantive definition of "debt collector" — indeed, Santander satisfies the substantive definition of "creditor," unlike the defendants in most of the cases that the Petitioners cite — so here, the debts' default status is irrelevant.

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[15] *See Bridge v. Ocwen Fed. Bank, FSB*, 681 F.3d 355, 360 (6th Cir. 2012) (reversing dismissal where "the Bridges have made allegations addressing all elements of the statutory definition of debt collector under the first sentence of § 1692a(6)"); *FTC v. Check Investors, Inc.*, 502 F.3d 159, 174 (3d Cir. 2007) ("Check Investors acquired the defaulted checks only for collection purposes. Indeed, it is in business to do just that: acquire seriously defaulted debt, the age of which allows Check Investors to acquire it for a few pennies on the dollar."); *Pollice v. National Tax Funding, L.P.*, 225 F.3d 379, 404 (3d Cir. 2000) ("there is no question that the 'principal purpose' of NTF's business is the 'collection of any debts,' namely, defaulted obligations which it purchases from municipalities"); *see also Volden v. Innovative Fin. Sys.*, 440 F.3d 947, 950 (8th Cir. 2006).

II. The Petitioners' taxonomy of "players in the consumer-credit and debt-collection markets" ignores many "players" whom the Petitioners' interpretation would sweep into the Fair Debt Collection Practices Act with undesirable consequences.

The Petitioners say that "[i]n general, the FDCPA has potential application to four kinds of entities that collect consumer debt":[16] loan originators, debt servicers, third-party debt collectors, and debt buyers. But that taxonomy is incomplete, and ignores many other "players" to whom the Fair Debt Collection Practices Act has historically not been applied, but whom the Petitioners' interpretation would sweep into the Act.

Two examples illustrate the unwisdom of that approach: a loan originator's successor by some means other than purchase of the debt, such as a successor by merger; and a lender that succeeds the loan originator as the issuer of a co-branded credit-card portfolio.

First, the sale of a debt by a loan originator to a debt buyer is not the only means by which a debt's ownership passes from one creditor to a successor creditor. It is also common for a loan originator to cease to exist, or at least to change its corporate form, as a result of an internal

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[16] Pet'rs' Br. at 6.

restructuring within a corporate parent, or of the loan originator's acquisition by a different company — in which case the loan itself is not sold as such, but passes to the successor creditor along with the loan originator's other assets and liabilities. For example:

- Bank A issues a loan to a consumer.
- The consumer usually pays on time but, on one isolated occasion, pays one installment late enough to bring the loan into default.
- On that day, while the consumer's payment is overdue, Bank A is acquired by Bank B — along with the debtor–creditor relationship with the consumer, who promptly brings the loan back into good standing.
- Bank A ceases to exist, and Bank B is now the creditor.

Under the Petitioners' interpretation, Bank B has become a "debt collector" under the Fair Debt Collection Practices Act with respect to the loan that was momentarily in default (but not with respect to other loans that were not in default at the moment of the sale).

Second, sometimes a loan originator gets out of the business of lending money, and outsources that function to a new lender. For example, many retailers offer store-branded credit cards to their customers as an incentive (often coupled with a discount) to shop at the retailers' stores. But since

the Great Recession, many retailers have outsourced their credit-card operations to banks that issue a co-branded card[17] — usually a national bank, which can operate in a nationwide market without competitive disadvantage.[18] Some retailers wrapped up their in-house banks as part of that process and, sometimes, a retailer moves its credit-

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[17] *See, e.g.*, Barbara Farfan, "Retail Stores with Credit Card Loyalty Incentives," The Balance (Aug. 12, 2016), https://www.thebalance.com/which-retail-stores-have-credit-card-offers-2892559 (accessed Mar. 22, 2017) ("A large number of the largest U.S. retail chains have aggressively marketed their own branded retail store credit cards in the past as a way to make it easy for credit-oriented customers to spend more and return often. . . . The days of standalone in-house retail company credit programs are pretty much a thing of the past for the U.S. retail industry, and have been replaced by credit cards that are co-branded with large national or multinational banking companies like Chase and credit services companies like American Express."); *see also* Lindsay Konsko, "Why Are Retailers Dumping Their Credit Cards?," Nerdwallet (June 10, 2014), https://www.nerdwallet.com/blog/credit-cards/retailers-dumping-credit-cards-target-macys-nordstrom/ (accessed Mar. 22, 2017).

[18] *See Tiffany v. Nat'l Bank of Mo.*, 85 U.S. 409, 411–13 (1873) (National Bank Act "is an enabling statute, not a restraining one," which "could not have been intended . . . to expose [national banks] to the hazards of unfriendly legislation by the States, or to ruinous competition with State banks").

card portfolio from one outside bank to another.[19] Under the Petitioners' interpretation, each such bank would become a "debt collector" with respect to any credit-card account in default at the moment of transfer.

In each of these examples, the lender in whose hands the debt ends up is not the loan originator — but neither is it a debt servicer, or a third-party debt collector, or a debt buyer (at least not in the traditional sense in which the Petitioners are using it, where the "debts are . . . assigned as a way of selling the debt to investors"[20]). The lender in whose hands the debt ends up is a successor creditor, who steps into the loan originator's shoes in the ordinary course of business. Not all creditors are loan originators, but all creditors are creditors — and as first-party creditors, collecting their own debt in their own name, the Fair Debt Collection Practices Act has never been applied to them. But the Petitioners' interpretation would reclassify them as "debt collectors" within the Act's meaning, at least with respect to any debt that was even momentarily in default when they acquired it.

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[19] *See, e.g.*, Fred O. Williams, "What to Do When Your Retail Store Card Switches Banks," CreditCards.com, http://www.creditcards.com/credit-card-news/retail-store-card-changes-banks-1267.php (accessed Mar. 22, 2017).

[20] Pet'rs' Br. at 7.

III. The national credit economy depends on the credit-and-collection industry, whose efficient operation depends on a secondary market in hard-to-collect debt, which the Petitioners' interpretation would depress.

As part of the process of attempting to recover outstanding payments, debt collectors and debt buyers are an extension of every community's businesses. Debt collectors and debt buyers work with these businesses, large and small, to obtain payment for the goods and services already received by consumers. Their efforts have resulted in the annual recovery of billions of dollars — dollars that are returned to and reinvested by businesses, and that would otherwise constitute losses on those businesses' financial statements. Recovering rightfully owed consumer debt helps prevent job losses; keeps credit, goods, and services available; and reduces the need for tax increases to cover governmental budget shortfalls. And without effective collections, consumers would be forced to pay more for their purchases to compensate for uncollected debts.

In 2014, ACA commissioned a study to measure the various impacts of third-party debt collection on the national and state economies. The study included both debt sold to a debt buyer, which acquired the issuer's interest in the debt; and debt assigned to a third-party debt collector, who acted as the issuer's (or the issuer's successor's)

agent but did not acquire the issuer's interest in the debt. The study found that, in calendar year 2013:

- Third-party debt collectors recovered $55.2 billion from consumers on behalf of creditor and government clients.
- The third-party collection of consumer debt returned an average savings of $389 per household by keeping the cost of goods and services lower.[21]

The credit-and-collection industry keeps bad debt from being a total loss for the original creditor. A lender loans out money with the expectation of being repaid according to the loan's terms, and its resources and operations are geared toward that expectation. But sometimes the expectation is disappointed and, in those cases, a debt buyer is a more attractive option for a lender than continued collection activity by the lender itself. Without debt buyers, the lender would simply charge off the loan, which would be a total loss — and would drive up the interest that the lender must charge in order to recoup that loss. But with a secondary market in hard-to-collect debt, the lender can sell the charged-

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[21] ACA International, *The Impact of Third-Party Debt Collection on the U.S. National and State Economies in 2013* (2014), cited in Josh Adams, ACA International White Paper, *The Role of Third-Party Debt Collection in the U.S. Economy* 2 (Jan. 2016), http://www.acainternational.org/assets/research-statistics/aca-wp-role3rdparty.pdf (accessed Mar. 22, 2017).

off loan to a debt buyer — at a discount, to be sure, but half a loaf is better than none. The national credit economy depends on the credit-and-collection industry, whose efficient operation depends on a secondary market in hard-to-collect debt, which maximizes recovery from that debt and thereby keeps interest rates down.

That secondary market lets a lender sell hard-to-collect debt to debt buyers who are willing to assume the burden and risk of collecting on that debt, and whose resources are better aligned with the collection of such debt and whose experience lets them collect on that debt more efficiently. The Petitioners' interpretation would depress that market by subjecting potential successor creditors — particularly successor creditors who are acquiring debt that is not in default — to costly litigation over their hitherto entirely lawful collection practices. A reversal of the Fourth Circuit's decision will make debt less attractive to debt buyers, and will therefore disadvantage lenders in managing their hard-to-collect debt.

Conclusion

This Court should affirm the Court of Appeals' judgment.

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Supreme Court of the United States

RICKY HENSON, ET AL., PETITIONERS

v.

SANTANDER CONSUMER USA INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN FINANCIAL SERVICES ASSOCIATION, AND FINANCIAL SERVICES ROUNDTABLE AS AMICI CURIAE SUPPORTING RESPONDENT

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Fed. Home Loan Mortg. Corp. v. Lamar, 503 F.3d 504 (6th Cir. 2007) 24

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15 U.S.C. § 1692k(a)(2)(B) 21

15 U.S.C. § 1692k(a)(3) 21

OTHER AUTHORITIES

Consumer Fin. Prot. Bureau, *Fair Debt Collection Act: CFPB Annual Report 2016* (Mar. 2016) 22

Edward I. Altman et al., *Bank Debt versus Bond Debt: Evidence from Secondary Market Prices*, 42 J. of Money, Credit & Banking 755 (2010) 11

TABLE OF AUTHORITIES—Continued

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Fed. Deposit Ins. Corp., *Quarterly Banking Profile: Fourth Quarter 2016* 10

Fed. Deposit Ins. Corp., *Risk Management Manual of Examination Policies* (Sept. 2016) ...11, 12, 13

Fed. Trade Comm'n, *The Structure and Practices of the Debt Buying Industry* (Jan. 2013) 25

George E. Pennacchi, *Loan Sales and the Cost of Bank Capital*, 43 J. of Fin. 375 (1988).....13

H.R. Rep. No. 95-131 (1977) 7, 9

Jerry D. Brown, *Painting a Mustache on the Mona Lisa—How Tinkering with the Validation Notice Will Get You Every Time*, 53 Consumer Fin. L.Q. Rep. 42 (1999).....19

Laurie A. Lucas & Alvin C. Harrell, *2000 Update on the Federal Fair Debt Collection Practices Act*, 55 Bus. Law. 1453 (2000).....20

Laurie A. Lucas et al., *Say What You Mean: The FDCPA and Problems of Interpretation*, 68 Bus. Law. 659 (2012) 20

Law Offices of Todd M. Friedman, P.C., http://www.toddflaw.com/About/Todd-M-Friedman.shtml (last visited Mar. 12, 2017).....23

Matthew R. Bremmer, Note, *The Fair Debt Collection Practices Act: The Need for Reform in the Age of Financial Chaos*, 76 Brook. L. Rev. 1553 (2011).....23, 24, 25

Office of the Comptroller of the Currency, *Concentrations of Credit* (Dec. 2011) 12

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Office of the Comptroller of the Currency, *Rating Credit Risk: Comptroller's Handbook* (Apr. 2001) 12

Rebecca S. Demsetz, *Bank Loan Sales: A New Look at the Motivations for Secondary Market Activity*, 23 J. Fin. Research 197 (2000) 11, 12

Robert M. Hunt, *Collecting Consumer Debt in America*, Phila. Fed. Reserve Bank Bus. Rev. 11 (Q2 2007) 8

Rustom M. Irani & Ralf R. Meisenzahl, *Loan Sales and Bank Liquidity Risk Management: Evidence from a U.S. Credit Register*, FEDS Working Paper No. 2015-001 (2015) 10

S. Rep. No. 95-382 (1977) 7, 8

Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, Mercatus Working Paper (Sept. 2015) 17

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN FINANCIAL SERVICES ASSOCIATION, AND FINANCIAL SERVICES ROUNDTABLE AS AMICI CURIAE SUPPORTING RESPONDENT

The Chamber of Commerce of the United States of America, American Financial Services Association, and Financial Services Roundtable respectfully submit this brief as amici curiae in support of respondent.[1]

INTERESTS OF AMICI CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in this Court in cases raising issues of concern to the Nation's business community.

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[1] Letters from the parties providing blanket consent to the filing of amicus briefs are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The American Financial Services Association ("AFSA"), founded in 1916, is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA has a broad membership, ranging from large international financial services firms to single office, independently owned consumer finance companies. The association represents financial services companies that hold leadership positions in their markets and conform to the highest standards of customer service and ethical business practices. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

The Financial Services Roundtable ("FSR") represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. FSR member companies provide fuel for America's economic engine, accounting directly for $98.4 trillion in managed assets, $1.1 trillion in revenue, and 2.4 million jobs.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fair Debt Collection Practices Act ("FDCPA" or "Act") is not a catch-all regulatory regime for any party that collects debts. Instead, it targets only carefully defined categories of "debt collectors." As relevant here, an entity is a debt collector if it "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due *another*." That definition unambiguously excludes parties who collect on debt that they own. Such debt is obviously not owed or due *another*.

The FDCPA's history and purpose confirm what the statutory text plainly provides. The legislative history makes clear that the Act was intended to cover independent debt collectors—third parties that collect debts owed to someone else. Members of Congress pointed to evidence that existing state and federal laws were insufficient to address complaints about independent debt collectors' collection activity. And members consistently distinguished those independent collectors from the types of parties that, by design, would *not* be covered: banks, retailers, credit unions, and finance companies.

Yet petitioners' reading of the FDCPA would sweep in such companies, despite the care Congress exercised in excluding them. Through a contorted reading of *exceptions* to the general definition of debt collector, petitioners would extend the FDCPA to reach financial institutions that purchase portfolios of debt

in the ordinary course of business, a small portion of which may be in default, and then collect on the loans for their own accounts.

This expansion of the FDCPA's coverage would have dramatic negative consequences. It would extend the FDCPA to many banks and consumer finance firms that primarily act as lenders. These firms regularly buy and sell loans to increase liquidity, manage risk, and satisfy regulated capital requirements. When these institutions buy and sell loan portfolios, some individual loans within them will inevitably be in default at the time of purchase. Whether a loan is considered to be in default depends on a web of crisscrossing state and federal laws, individual loan contract terms, the status of loan payments, and more. Without a cost-prohibitive loan-by-loan review, there is thus no realistic way to screen out defaulted loans even if a purchaser wanted to.

Under petitioners' reading of the statute, the inevitable presence of defaulted loans in a portfolio transforms the purchaser into an FDCPA debt collector—not just for those loans but for *all* of the purchaser's loans, including the ones it originated. That in turn would drive up the cost of credit for consumers and chill the critical secondary market in loans, which plays an indispensable role in sound financial management practices.

There is one group that would benefit from petitioners' interpretation, albeit not one petitioners might be willing to acknowledge. Expanding "debt

collector" to include traditional consumer finance companies would embolden a growing cottage industry of vexatious FDCPA litigation. The FDCPA's numerous technical requirements have allowed enterprising plaintiffs and their attorneys to spin innocent and unavoidable infractions into large awards, mostly for the benefit of the attorneys. Nearly one out of every eight private statutory actions filed in federal district court in 2015 was an attempt to recover under the Act. Expanding the FDCPA to cover lenders like Santander would further clog the federal courts' dockets with FDCPA litigation, with little or no benefit for consumers.

ARGUMENT

Petitioners' interpretation of the FDCPA defies its plain text and untethers the statute from Congress's purpose in enacting it. Their reading would result in a dramatic expansion of the FDCPA's net to snare a range of financial institutions that bear little resemblance to the specialized debt-collection entities Congress intended the statute to cover. That in turn would chill the critically important secondary market for loans and increase the cost of credit to consumers. The only beneficiaries would be FDCPA plaintiffs' attorneys, who would acquire new targets for vexatious litigation under the statute. The court of appeals' judgment should be affirmed.

I. PETITIONERS' INTERPRETATION OF THE FDCPA CONFLICTS WITH THE STATUTE'S TEXT, HISTORY, AND PURPOSE

The FDCPA does not apply to every person who collects a debt. Instead, the statute covers parties whose principal business purpose is debt collection or who regularly collect debts for others. There is no support in the Act's text, history, or purpose for extending the statute to cover traditional consumer lenders, like Santander, whose principal purpose is not debt collection and who buy loans and collect on them for their own accounts.

1. Congress drafted the FDCPA to apply to only "debt collectors." As relevant here, an entity is a debt collector if it (1) "uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts" or (2) "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). This case involves the scope of the second definition.

Respondent demonstrates how the statute's text and structure squarely answer the question presented here. Resp't Br. 15-24. Simply put, an entity that collects debts that it owns is not collecting a debt "owed or due or asserted to be owed or due *another*." 15 U.S.C. § 1692a(6) (emphasis added). That is enough to resolve this case. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (when a statute's language is plain, statutory interpretation begins and ends "with

the language of the statute itself" (quotation marks and citation omitted)).

2. Given the text's clarity on this point, it is not surprising that the contemporaneous legislative record confirms that Congress limited the Act's coverage to a specific class—parties whose primary purpose is collecting debts or who regularly collect debts *for others*. Both the Senate and House reports accompanying the final bill focus on independent debt collectors. S. Rep. No. 95-382, at 2 (1977); H.R. Rep. No. 95-131, at 6-7 (1977). That was because Congress understood that "independent debt collectors constitute an industry separate from creditors"—that is, separate from traditional consumer lenders, such as banks. H.R. Rep. No. 95-131, at 6-7. Hearings showed that "independent debt collectors are the prime source of egregious collection practices." S. Rep. No. 95-382, at 2; *see* H.R. Rep. No. 95-131, at 25 (Rep. Mark Hannaford explaining that "evidence is available only as to abuses by third-party rather than in-house collection agents"); *see also* 15 U.S.C. § 1692 (congressional findings on such abusive practices).

Congress pointed to several reasons why independent debt collectors warranted special attention. First, the scale and number of such entities made enforcement actions by federal regulators less likely to "change industrywide practices" than would be the case with actions against larger entities like banks and finance companies. H.R. Rep. No. 95-131, at 7.

Second, independent debt collectors at the time also offered no consumer-facing products or services that would create a longer-term relationship with consumers, thus providing less of an incentive to maintain strong reputations among consumers. On the other hand, Congress understood that financial institutions repeatedly interact with consumers and therefore generally have a stronger interest in avoiding conduct that might alienate present or future customers. S. Rep. No. 95-382, at 2.

Finally, unlike financial institutions, independent debt collectors were not already subject to oversight from other federal regulatory regimes, such as those governing depository institutions. Robert M. Hunt, *Collecting Consumer Debt in America*, Phila. Fed. Reserve Bank Bus. Rev. 11, 20 (Q2 2007) (explaining importance of this rationale at time of enactment of the FDCPA).[2]

Against the backdrop of this record, the FDCPA committee reports were explicit about which parties the Act would and would not cover. Subject to the Act's express exclusions, the Act would "cover all third persons who regularly collect debts *for others*." S. Rep. No. 95-382, at 3 (emphasis added). Conversely, the statute would not extend to "any person who does not directly or indirectly collect or attempt to collect a debt owed or due or asserted to be owed or due another and who engages in any business the principal purpose of which

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[2] *Available at* https://tinyurl.com/collectingconsumerdebt.

is other than the collection of debts, *such as banks, retailers, credit unions or finance companies*." H.R. Rep. No. 95-131, at 4 (emphasis added).

II. PETITIONERS' INTERPRETATION WOULD HARM CONSUMERS BY THREATENING A BROAD RANGE OF LENDERS WITH FDCPA LIABILITY

Notwithstanding the FDCPA's plain text and consistent legislative record, petitioners insist that the statute should be construed to cover the "debt buying industry," which specializes in "'purchas[ing] defaulted debt from original creditors' for pennies on the dollar" and turning those purchases into profits through aggressive collection tactics. Pet'rs Br. 8 (quoting *Consumer Fin. Prot. Bureau, Fair Debt Collection Practices Act: CFPB Annual Report 2014* (Mar. 2014)). But there is no need to contort the statutory language to encompass those entities. The FDCPA's first definition of "debt collector" already covers them—the collection of debts is their "principal purpose." 15 U.S.C. § 1692a(6).

Petitioners' expansion of the FDCPA's coverage would instead hit a different group altogether: diversified financial institutions like Santander that buy and sell debts as part of sound financial management. That reading would unnecessarily make these prudent measures more expensive, ultimately driving up the cost of credit to consumers without any corresponding benefit to anyone other than FDCPA plaintiffs' lawyers.

A. Financial Institutions Buy And Sell Loans For Many Different Reasons, And Consumers Benefit From This Activity

Buying and selling loans is an important part of a healthy credit market. Most of these sales look nothing like the "pennies-on-the-dollar" transactions on which petitioners focus. Originating lenders sell loans that they originate, rather than keep them until maturity, for many reasons related to sound financial management. And other lenders buy those loans, rather than hold only loans they originate, for many of the same reasons.

Scholars refer to this activity as the "secondary market" for loans. *E.g.*, Rustom M. Irani & Ralf R. Meisenzahl, *Loan Sales and Bank Liquidity Risk Management: Evidence from a U.S. Credit Register*, FEDS Working Paper No. 2015-001, 1 n.2 (2015).[3] That market can include both commercial and consumer loans, and the total volume of trading can be enormous—in 2016 it exceeded $486 billion. Fed. Deposit Ins. Corp., *Quarterly Banking Profile: Fourth Quarter 2016* 13.[4] Little of this activity is of the pennies-on-the-dollar variety highlighted by petitioners. Instead, the vast majority of buyers of these loans pay 90% or more of a

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[3] *Available at* https://tinyurl.com/irani-loan-sales.

[4] *Available at* https://tinyurl.com/fdic-quaterly-banking-profile. The actual volume is likely larger because the Quarterly Report data reflects only sales where the seller has offered some enhancement to the buyer to reduce the buyer's risk in the case of non-performance, such as recourse against the seller or a third-party insurer. *Ibid.*

loan's face value. Edward I. Altman et al., *Bank Debt versus Bond Debt: Evidence from Secondary Market Prices*, 42 J. of Money, Credit & Banking 755, 758 (2010).[5] Buying and selling loans helps financial institutions efficiently meet their customers' needs in a variety of ways.

First, the buying and selling of loans helps lenders meet demand for new loans. To state the proposition simply, a lender can extend new credit only if it has funds to lend. Some lenders may experience more demand for new credit than they can meet with existing funds. Rebecca S. Demsetz, *Bank Loan Sales: A New Look at the Motivations for Secondary Market Activity*, 23 J. Fin. Research 197, 200-01 (2000). Others may have an abundance of cash reserves. *Ibid.* When a lender with excess demand sells some of its loans to a lender with excess funds, the seller gets new funds that it can use to offer new credit. *Ibid.* Buying and selling loans thus helps lenders manage their liquidity as supply and demand for different types of credit change over time. *Ibid.*; Fed. Deposit Ins. Corp., *Risk Management Manual of Examination Policies* 6.1-7 (Sept. 2016) [hereinafter *Risk Management Manual*].[6] This helps keep credit costs for consumers low and improves credit availability. Irani, *supra*, at 1-3.

Second, the buying and selling of loans allows lenders to reduce risks by maintaining a diverse portfolio of assets. For example, if a local lender keeps all

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[5] *Available at* https://tinyurl.com/bank-vs-bond-debt.

[6] *Available at* https://tinyurl.com/risk-mgmt-manual.

its originated residential mortgages until maturity, a drop in local housing prices could place the lender at significant risk of simultaneous defaults across multiple mortgages. Demsetz, *supra*, at 200-01 (explaining how banks "use loan sales and purchases to rebalance a portfolio of a given size"). Such phenomena, often called "concentrations of credit," "have been key factors in banking crises and failures." Office of the Comptroller of the Currency, *Concentrations of Credit* 1 (Dec. 2011).[7] Thus, a properly executed strategy of selling some loans with similar risk exposures and buying others with a different risk profile can help a lender reduce the risk of a catastrophic failure. Demsetz, *supra*, at 200-01; *Concentrations of Credit* at 12-13.

Third, the buying and selling of loans assists lenders (especially banks) in meeting capital requirements. Capital requirements ensure that a lender's ratio of equity to debt stays within healthy limits. Such requirements are heavily regulated and satisfying them is a crucial part of sound risk management. *E.g.*, *Risk Management Manual* at 2.1-2.

Loans are assets on a bank's balance sheet and are risk rated under banking regulations. *Id.* at 3.2-2. Lenders assign a risk rating based on a loan's characteristics, such as credit concentration, borrower characteristics, and the status of a loan's performance. *Id.* at 2.1-4; Office of the Comptroller of the Currency, *Rating Credit Risk: Comptroller's Handbook* 13-20 (Apr.

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[7] *Available at* https://tinyurl.com/occ-concentrations.

2001).[8] High-risk loans with high-risk ratings require a bank to hold additional capital. *Risk Management Manual* at 2.1-3—2.1-5. A given loan's risk rating also may change over time based on market conditions, a borrower's performance, and other factors. *Ibid.* Banks and other lenders must monitor the loans they hold and ensure that, even as risk ratings change, the lenders' overall holdings and liabilities satisfy regulated capital requirements. For decades, banks have bought and sold loans to help them meet these requirements through adjusting the mix of loans that they hold. *E.g.*, George E. Pennacchi, *Loan Sales and the Cost of Bank Capital*, 43 J. of Fin. 375, 375-76 (1988).

Empirical studies show that such practices reduce credit costs, benefiting consumers. *Ibid.* For example, it can often be cheaper to sell a portion of a lender's loan portfolio to pay down debts than to raise equity through other means, like through attracting more traditional deposits. *Id.* at 382-83. And lenders price those savings into the costs of extending credit to consumers. *Ibid.*

B. Standard Loan Sales Will Inevitably Include Some Loans In Default

When lenders buy and sell portfolios of loans, those portfolios will almost certainly include some loans in default, as occurred here. Indeed, even if a purchaser wished to exclude loans in "default" from the portfolio to avoid classification as an FDCPA "debt

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[8] *Available at* https://tinyurl.com/occ-rating-credit-risk.

collector" under petitioners' interpretation, it would be difficult, if not impossible, for it to do so.

Part of the problem is that "default" is not a well-understood, bright-line category. The FDCPA does not even define the term. Nor is "default" a term of art with a single accepted meaning in the industry. Despite calls from the FTC to amend the statute to address this gap, Congress has yet to do so. *Alibrandi v. Fin. Outsourcing Servs., Inc.*, 333 F.3d 82, 86-87 & n.5 (2d Cir. 2003) (citing FTC Annual Report: FDCPA, http://www.ftc.gov/os/2001/03/fdcpaar2000.htm (Mar. 2001)).

Absent a statutory definition, courts have thus been left to assess whether a debt is "in default" by considering multiple factors on a case-by-case basis. In *Alibrandi*, for example, the Second Circuit concluded that "default" could take on different meanings depending on context. *Id.* at 86-87. For some types of debt, such as student loans, the court held that federal regulations define when a debt is in default. *Id.* at 87 (citing 34 C.F.R. § 682.200(b) (1998), 7 C.F.R. § 762.141(a) (1999), 12 C.F.R. § 336.3(c) (1999), and 34 C.F.R. § 685.102(b) (1999)). For other debts, such as car loans, creditors and debtors have "considerable leeway contractually to define their own periods of default, according to their respective circumstances and business interests." *Id.* at 87 n.5. Whether a debt is in default also may depend on whether there is a forbearance agreement for the particular loan, under which the lender has agreed to postpone legal action and allow a delinquent borrower time to catch up on outstanding

payments. *See Bailey v. Sec. Nat'l Servicing Corp.*, 154 F.3d 384, 387 (7th Cir. 1998). In some circuits, the specifics of "'applicable state law'" may also be relevant to evaluating whether a loan is in default. *De Dios v. Int'l Realty & Invs.*, 641 F.3d 1071, 1074 (9th Cir. 2011) (quoting Fed. Trade Comm'n, Advisory Op. n.2 (Apr. 25, 1989)).

When buyers and sellers transact in sizeable loan portfolios, there is no feasible method to determine which of the debts may be in default. Doing so would require the parties to identify, among other things, whether each account was subject to an applicable federal or state regulation, the terms of the underlying contract for each debt, the status of receipt of payments (which typically changes daily across a portfolio of any size), and the effect of any forbearance agreements. And they would have to do this on an account-by-account basis throughout the portfolio, possibly requiring analysis of the particulars of thousands or even millions of loans.

For all these reasons, when lenders buy and sell credit accounts, some portion of the accounts will be in default at the time of sale, whether or not the purchaser's goal is to purchase defaulted debt. In this case, for example, Santander purchased $3.55 billion in loans, which included both defaulted and non-defaulted debt. Resp't Br. 43; Resp't C.A. Br. 56. In another case, the buyer purchased 128,000 mortgages. *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 535 (7th Cir. 2003). Ten percent of those were possibly in default at the time of sale, although the facts later

showed that some of those loans were not, in fact, in default. *Ibid.* Other cases are similar. *See Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1311 (11th Cir. 2015) (sale of $28 billion in credit card accounts; $1 billion or roughly 3.5% of which were alleged to be delinquent at the time of sale); *Oppong v. First Union Mortg. Corp.*, 215 F. App'x 114, 118-19 (3d Cir. 2007) (reporting that in a typical three-month period "89, out of 141,597, of the loans that Wells Fargo acquired were in default").

C. Petitioners' Expansive Interpretation Will Harm Consumers Without Any Offsetting Benefit

The stunning implications of petitioners' interpretation of the FDCPA are clear against the backdrop of these market realities. When a financial institution purchases a loan portfolio that includes some loans in default (which will almost always be the case), it could find itself tagged as an FDCPA "debt collector," so long as a plaintiff could convince a court that the institution's collection activities were sufficiently "regular[]," 15 U.S.C. § 1692a(6). And, critically, this designation would apply not just to the lender's activities collecting on debts purchased in default, but to *all* its collection activities, including those for loans the lender itself originated. *See* Pet'rs Br. 53-54. As petitioners put it, once firms qualify as debt collectors based on some subset of activity, they are "debt collectors, full stop." Pet'rs Br. 54. That would mean that virtually every lending institution could be subject to FDCPA liability for virtually every loan it makes.

This cannot possibly be what Congress intended. It would explode the FDCPA's coverage beyond the limited class of debt collection entities Congress targeted to encompass financial institutions collecting on their own loans in the ordinary course of business. Both sound financial management and consumers would pay the price.

If routine purchases of loans on the secondary market also bring along the specter of FDCPA liability, that market will be considerably chilled. Lenders' ability to buy and sell loans to help with liquidity, risk diversity, and satisfaction of capital requirements would become considerably more expensive. *Supra* Section II.A. And the increased cost of lending would force lenders to increase the costs of credit for consumers, reduce the amount of credit they are willing to offer, or both. Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, Mercatus Working Paper 22-23 (Sept. 2015).[9] Empirical studies consistently show that the first parties affected by these changes would be high-risk borrowers, who are generally low-income individuals. *Id.* at 23-24 (collecting studies).

Petitioners' requested extension of the FDCPA's coverage would thus come at a high price. What benefits would there be on the other side of the ledger? Other than for plaintiffs' attorneys, *see infra* Section III, any benefits are nearly impossible to discern.

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[9] *Available at* https://tinyurl.com/zywicki-law-economics.

Banks and other financial institutions are heavily regulated at both the state and federal level, and those regimes already police any abusive conduct related to debt collecting by those institutions. *See* Resp't Br. 41 & n.11 (listing relevant statutes).

At the same time, the "debt buyers" on which petitioners and their amici do focus will remain covered under the FDCPA's principal definition of "debt collector," regardless of the outcome here. Petitioners and their amici are asking the Court to fill a gap that does not exist.

As described by petitioners, entities specifically purchasing defaulted debt generally will fit the first definition of "debt collector"—parties whose "principal purpose" is "the collection of any debts." 15 U.S.C. § 1692a(6). Indeed, when that industry's members have faced actions under the Act, many appear to have conceded that they qualify as "debt collectors." *See* Consent Order, *In re Encore Capital Grp.*, No. 2015-22 (C.F.P.B. Sept. 9, 2015); Consent Order, *In re Portfolio Recovery Assocs.*, No. 2015-23 (C.F.P.B. Sept. 9, 2015); Consent Decree, *United States v. Capital Acquisitions & Mgm't Corp.*, No. 04-cv-50147 (N.D. Ill. Mar. 24, 2004). There is thus no cause to distort the second definition of "debt collector" because the entities petitioners claim to be concerned with may already be covered. *See* Nat'l Consumer Law Ctr. Br. 33 n.10 ("The vast segment of the debt industry that exists solely to purchase and collect debt * * * should remain untouched" by a ruling for respondent.). For that reason, petitioners' concern that parties will simply take title to debt

they collect to avoid FDCPA liability is unfounded. *Contra* Pet'rs Br. 40-42. Petitioners have not shown that courts have had any difficulty identifying when debt owners' principal purpose is debt collecting. *E.g.*, *Fed. Trade Comm'n v. Check Inv'rs, Inc.*, 502 F.3d 159, 172-73 (3d Cir. 2007).

III. PETITIONERS' INTERPRETATION WOULD EMBOLDEN THE COTTAGE INDUSTRY OF FDCPA LITIGATION

The FDCPA already has sparked a firestorm of vexatious litigation. Broadening its reach here would further fan the flames.

1. The Act imposes many technical procedural requirements on debt collectors that make minor violations unavoidable. *See, e.g.*, 15 U.S.C. § 1692g(a) (requiring debt collectors to give detailed notice). Other provisions contain restrictions whose scope of prohibited conduct is far from clear. *See id.* § 1692e (prohibiting collecting methods that are "false, deceptive, or misleading"); *id.* § 1692f (prohibiting methods that are "unfair or unconscionable"). As Justice Kennedy has noted, "[g]iven the complexity of the FDCPA regime, technical violations are likely to be common." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 559 U.S. 573, 618 (2010) (Kennedy, J., dissenting) (citations omitted); *see also* Jerry D. Brown, *Painting a Mustache on the Mona Lisa—How Tinkering with the Validation Notice Will Get You Every Time*, 53 Consumer Fin. L.Q. Rep. 42, 42 (1999) (estimating that 90% of all FDCPA claims involve alleged technical notice violations);

Laurie A. Lucas & Alvin C. Harrell, *2000 Update on the Federal Fair Debt Collection Practices Act*, 55 Bus. Law. 1453, 1454 (2000) (reaching similar conclusion).

The Act's requirements can create a damned-if-you-do-damned-if-you-don't situation for even a careful defendant. For example, in *Nero v. Law Office of Sam Streeter, P.L.L.C.*, a plaintiff sued for an alleged violation of Section 1692g, the FDCPA's notice provision. 655 F. Supp. 2d 200, 205 (E.D.N.Y. 2009). She argued that a letter informing her of a debt was deceptive because it told her that she could request verification but did not specify whether the request should be oral or written. *Id.* at 206. She never requested verification, but she did file suit under the FDCPA. *Ibid.* The district court sided with the plaintiff, holding that the letter was deceptive because verification could only be triggered by a written request and the letter should have said that. *Ibid.* Yet in *Jerman*, the underlying district court holding (that this Court did not disturb) was that a defendant was liable for doing just that—sending a notice letter telling a debtor that verification should be requested in writing. 559 U.S. at 579. That was held to be deceptive because written verification was not required. *Ibid.*; *see* Laurie A. Lucas et al., *Say What You Mean: The FDCPA and Problems of Interpretation*, 68 Bus. Law. 659, 666-68 (2012) (discussing other cases).

The Act pairs vague requirements that can lead to such head-spinning results with harsh civil sanctions for violating "*any* provision." 15 U.S.C. § 1692k(a) (emphasis added). It purports to allow an individual to sue

for even harmless technical infractions and receive "such additional damages as the court may allow," up to $1,000. *Id.* § 1692k(a)(2)(A). It explicitly contemplates class-action suits and allows plaintiffs to recover up to "the lesser of $500,000 or 1 per centum of the net worth" of the defendant (on top of actual and statutory damages). *Id.* § 1692k(a)(2)(B). The Act also orders that successful plaintiffs recover their costs and reasonable attorney's fees. *Id.* § 1692k(a)(3).

The amounts for attorney's fees and costs in FDCPA cases often dwarf any damages for actual harm or statutory damages. Indeed, some courts have required an award of attorney's fees even when a plaintiff suffers no harm and the alleged violation is so minor that it does not merit statutory damages. *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 28 (2d Cir. 1989); *see Graziano v. Harrison*, 950 F.2d 107, 113-14 (3d Cir. 1991) (explaining that, regardless of damages, award of attorney's fees is mandatory except "in unusual circumstances"); *Zagorski v. Midwest Billing Servs., Inc.*, 128 F.3d 1164, 1166-67 (7th Cir. 1997) (per curiam) (abuse of discretion to deny attorney's fees after $100 stipulated judgment). *But see Johnson v. Eaton*, 80 F.3d 148, 151-52 (5th Cir. 1996) (attorney's fees not required for technical violation).

It is thus common for FDCPA plaintiffs' attorneys to make out far better than FDCPA plaintiffs. *E.g.*, *Jallo v. Resurgent Capital Servs., L.P.*, No. 4:14-cv-00449, 2017 WL 914291, at *2-3 (E.D. Tex. Mar. 7, 2017) (awarding roughly $30 in damages per class member and $150,000 in attorney's fees); *Norton v.*

Wilshire Credit Corp., 36 F. Supp. 2d 216, 221 (D.N.J. 1999) (awarding nearly $58,000 in costs and fees for a $5,800 judgment); *Clomon v. Jackson*, 988 F.2d 1314, 1322 (2d Cir. 1993) (for letter to recover $9.42 debt, awarding $1,000 statutory damages and over $3,000 in attorney's fees and costs); *Nguyen v. HOVG, LLC*, No. 14-cv-837, 2015 WL 5476254, at *6 (S.D. Cal. Sept. 15, 2015) (awarding $41,350 in fees for $3,002 settlement).

2. The mix of strict yet vague requirements and harsh penalties has created a boom in attorney-driven litigation that benefits only plaintiffs' attorneys. In less than ten years, the number of FDCPA cases filed each year has nearly tripled, from 4,316 cases in 2007 to 11,697 in 2015. Consumer Fin. Prot. Bureau, *Fair Debt Collection Act: CFPB Annual Report 2016* 15 (Mar. 2016) [hereinafter *CFPB 2016 Report*].[10] Excluding prisoner petitions, that means nearly one out of every eight private statutory actions filed in federal district court was brought under the FDCPA. U.S. Courts, *Statistics & Reports*, Table C-2 (Dec. 31, 2015).[11] And plaintiffs' attorneys appear to increasingly be suing banks and similar financial institutions, the paradigmatic *creditors* under the Act. *E.g.*, *Rhodes v. U.S. Bank Nat'l Ass'n*, ___ F. Supp. 3d ___, 2017 WL 770941 (E.D. Pa. Feb. 27, 2017); *Colella v. First Secs. Tr. & Sav. Bank*, No. 15-cv-11829, 2017 WL 467684 (N.D. Ill. Feb. 3, 2017); *Newfield v. City Nat'l Bank, NA*, No.

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[10] *Available at* https://tinyurl.com/cfpb-2016-report.

[11] *Available at* https://tinyurl.com/uscourts-statistics. The report shows 95,989 private statutory cases for 2015, excluding prisoner petitions.

16-cv-3833, 2017 WL 540944 (C.D. Cal. Jan. 27, 2017); *Johnson v. Bank of Am., N.A.*, No. 16-cv-6699L, 2017 WL 372053 (W.D.N.Y. Jan. 26, 2017).

As amicus the Chamber of Commerce recently explained to this Court, there is strong evidence that attorneys, not clients, are driving this boom in FDCPA claims. Br. of the Chamber of Commerce of the United States of Am. as *Amicus Curiae* in Support of Pet'r at 28-29, *Midland Funding, LLC v. Johnson* (No. 16-348) (filed Nov. 21, 2016). An analysis by FDCPA Case Listing Service, LLC, which tracks federal consumer lawsuits, found that just ten law firms represented 23% of the more than 9,500 plaintiffs who brought individual FDCPA and Telephone Consumer Protection Act claims in federal court from January through September 2016. *Ibid.* One attorney even boasts of having personally "litigated over 5,000 individual Plaintiff's cases" using the FDCPA and a similar state law. *See* Law Offices of Todd M. Friedman, P.C., http://www.toddflaw.com/About/Todd-M-Friedman.shtml (last visited Mar. 27, 2017). Such attorney-driven litigation may favor claims based on technical FDCPA violations, as opposed to more fact-specific substantive claims of actual harm, because such suits "often present facts that are readily certifiable as a class action." Matthew R. Bremmer, Note, *The Fair Debt Collection Practices Act: The Need for Reform in the Age of Financial Chaos*, 76 Brook. L. Rev. 1553, 1579 (2011).

Courts have begun to take notice of the problem. As Justice Kennedy discussed at length in *Jerman*, judicial interpretations of the Act have created a

"troubling dynamic of allowing certain actors in the system to spin even good-faith, technical violations of federal law into lucrative litigation, if not for themselves then for the attorneys who conceive of the suit." 559 U.S. at 617. Other judges have made similar observations. *See, e.g., Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 513-14 (6th Cir. 2007) (criticizing the "cottage industry" of "professional plaintiffs" that profit from the FDCPA (quoting *Jacobson v. Healthcare Fin. Servs., Inc.*, 434 F. Supp. 2d 133, 138-39 (E.D.N.Y. 2006))); *Zavodnick v. Gordon & Weisberg, P.C.*, No. 10-cv-7125, 2012 U.S. Dist. LEXIS 78868, at *2 (E.D. Pa. June 6, 2012) (criticizing one firm's "cut and paste" practice of submitting nearly identical filings in numerous FDCPA cases and then requesting large attorney's fees following settlement).

3. Accepting petitioners' invitation to expand the scope of covered "debt collectors" beyond what the statute plainly authorizes would exacerbate these problems, further driving up the costs of consumer credit. The current boom in attorney-driven litigation already harms the consumers that the FDCPA was designed to protect. The risk of a large damages award and "the complexity of the FDCPA regime" push many defendants to settle despite potentially meritorious defenses. *Jerman*, 559 U.S. at 616, 618 (Kennedy, J., dissenting). Defendants often will conclude that the cost of a small settlement will be less than litigation costs irrespective of the underlying claim's merits. *Ibid.*; Bremmer, *supra*, at 1580-81.

But the cumulative costs of such settlements still drive up the cost of collecting debts, which creditors must ultimately account for when pricing consumer credit. Bremer, *supra*, at 1556. As the FTC found based on a wealth of empirical studies, "greater efficiency in the judicial enforcement of credit contracts results in the greater availability or lower cost of credit." Fed. Trade Comm'n, *The Structure and Practices of the Debt Buying Industry* 11 n.48 (Jan. 2013) (citing studies).[12] And the reverse is true as well—inefficiencies, such as from hyperactive litigation over technical violations related to debt collection, limit the availability of credit and increase its cost. *Ibid.*

This dynamic is bad enough now. But it stands to grow far worse if petitioners prevail here. FDCPA plaintiffs' attorneys would acquire a bevy of new targets—financial institutions engaged in normal financial management practices. The credit markets, and consumers who depend on them, would pay the price.

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[12] *Available at* https://tinyurl.com/structureandpractices.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

RICKY HENSON, IAN MATTHEW GLOVER, KAREN PACOULOUTE, F/K/A KAREN WELCOME KUTEYI, AND PAULETTE HOUSE,

Petitioners,

v.

SANTANDER CONSUMER USA, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* THE CLEARING HOUSE ASSOCIATION L.L.C., AMERICAN BANKERS ASSOCIATION, AND CONSUMER BANKERS ASSOCIATION IN SUPPORT OF RESPONDENT

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Aguayo v. *U.S. Bank*,
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Alibrandi v. *Fin. Outsourcing Servs., Inc.*,
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Davidson v. *Capital One Bank (USA), N.A.*,
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Epps v. *JPMorgan Chase Bank, N.A.*,
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Fed. Home Loan Mortg. Corp. v. *Lamar*,
503 F.3d 504 (6th Cir. 2007) 28

Henson v. *Santander Consumer USA, Inc.*,
817 F.3d 131 (4th Cir. 2016) 7, 16, 18

Huebner v. *Midland Credit Mgmt, Inc.*,
85 F. Supp. 3d 672 (E.D.N.Y. 2015) 28

Jacobson v. *Healthcare Financial Servs.*, 434 F. Supp. 2d 133 (E.D.N.Y. 2006) 29

Jerman v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010) 10, 27

Schlegel v. *Wells Fargo Bank, NA*, 720 F.3d 1204 (9th Cir. 2013) 16

Statutes:

15 U.S.C. § 45 23

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12 U.S.C. § 5531 24

12 U.S.C. § 5536 24

12 U.S.C. § 5481 24

Other Authorities:

2 Consumer Law Sales Practices and Credit Regulation § 632 (updated Sept. 2016) 26

123 Cong. Rec. H2925 (Apr. 4, 1977) 13

123 Cong. Rec. S13854 (Aug. 5, 1977) 14, 15

Adam D. Maarec and John C. Morton, *A Survey of Activities Identified as Unfair, Deceptive, or Abusive Under the Dodd-Frank Act* (Jan. 25, 2016) 24

Bd. of Governors of the Fed. Reserve Sys., *Consumer Credit (G.19) Statistical Release December 2016* (Jan. 2017) 4

Consumer Credit & Payments Statistics, Federal Reserve Bank of Philadelphia (Oct. 22, 2015) 4

Consumer Fin. Prot. Bureau, *Ask CFPB: Debt Collection* (last visited Mar. 24, 2017) 28

Consumer Fin. Prot. Bureau Bulletin 2013-07, *Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts* (July 10, 2013) 26

DBA Int'l, *The Debt Buying Industry: A White Paper* (Apr. 2015) 5

Elizabeth A. Duke, Governor, Fed. Reserve Bd. of Governors, Speech: Fostering a Healthy Credit Environment (June 30, 2010) 4

Fed. Deposit Ins. Corp., *Statistics on Depository Institutions Report—Net Loans and Leases* (Dec. 31, 2016) 4

Fed. Reserve Bank of N.Y., *Quarterly Report on Household Debt and Credit* (Feb. 2017) 5

Fed. Trade Comm'n, *The Structure and Practices of the Debt Buying Industry* (Jan. 2013) ..... *passim*

H.R. 5294, 95th Cong. § 802(f) (1977) 12

H.R. Rep. No. 131, 95th Cong., 1st Sess. (1977) 13, 14, 15, 17, 23

James McAndrews, Dir. of Research, Fed. Reserve Bank of N.Y., Remarks at the Econ. Press Briefing on Student Loans, Fed. Reserve Bank of N.Y.: Credit Growth and Econ. Activity after the Great Recession (Apr. 16, 2015) 4, 5

Jim Reber, *The Case for Buying Loans*, Ind. Banker Magazine (Sept. 2009) 8

Office of the Comptroller of the Currency Bulletin 2014-37, *Description: Risk Mgmt. Guidance* (Aug. 4, 2014) 6, 7, 25

Office of the Comptroller of the Currency, Statement Provided to the Subcomm. on Fin. Insts. and Consumer Prot., Senate Comm. on Banking, Hous., and Urban Affairs (July 17, 2013) 6

Rebecca S. Demsetz, *Bank Loan Sales: A New Look at the Motivations for Secondary Mkt. Activity*, 23 Journal of Financial Research 197 (2000) 8

Robert M. Hunt, *Collecting Consumer Debt in Am.*, Fed. Reserve Bank of Phila. Bus. Review 11 (Q2 2007) 14, 16

Santander Consumer USA Holdings Inc., Form 10-K (Feb. 28, 2017) 16, 17

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Sec. Indus. and Fin. Mkts. Ass'n, *Statistics: US ABS Issuance and Outstanding, US Mortgage-Related Issuance and Outstanding* (March 20, 2017) 4

S. Rep. No. 382, 95th Cong., 1st Sess. (1977) 14, 15

Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, 28 Loy. Consumer L. Rev. 167 (2016) 7, 14, 30

William P. Hoffman, *Recapturing the Congressional Intent Behind the Fair Debt Collection Practices Act*, 29 St. Louis U. Pub. L. Rev. 549 (2010) 29, 32

INTEREST OF *AMICI CURIAE*[1]

The Clearing House, established in 1853, is the oldest banking association and payments company in the U.S. Its members include the world's largest commercial banks; they hold more than half of all U.S. deposits and employ over one million people in the U.S. and over two million people worldwide. The Clearing House Association L.L.C. is a nonpartisan advocacy organization that represents the interests of its owner banks by developing and promoting policies to support a safe, sound, and competitive banking system that serves customers and communities. Its affiliate, The Clearing House Payments Company L.L.C., is regulated as a systemically important financial market utility. It owns and operates payments technology infrastructure that provides safe and efficient payment, clearing, and settlement services to financial institutions, and clears almost $2 trillion every day.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel contributed any money to fund its preparation or submission. The parties have consented to the filing of *amicus curiae* briefs in support of either party.

Respondent Santander Consumer USA Inc. is wholly owned by Santander Consumer USA Holdings Inc. Santander Holdings USA, Inc. owns 10% or more of the stock of Santander Consumer USA Holdings Inc. and is a subsidiary of Banco Santander, S.A., which is a member of The Clearing House. Santander Bank, N.A. is a member of the American Bankers Association and the Consumer Bankers Association, and is wholly owned by Santander Holdings USA, Inc.

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its more than one million employees. ABA members are located in all fifty States and Washington, D.C. and include large and small financial institutions. The ABA's members hold a substantial majority of the U.S. banking industry's domestic assets and are leaders in all forms of consumer financial services.

The Consumer Bankers Association ("CBA") is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

Amici's members actively participate in the United States' multi-trillion dollar debt origination and debt sale markets, which play an essential role in providing the credit to individuals and businesses necessary for the functioning of the American economy. *Amici* have a significant interest in affirmance of the decision below, because petitioners' claims implicate all lenders that purchase, as well as originate, loans.

Respondent's brief thoroughly and persuasively explains why the plain text of the Fair Debt Collection

Practices Act ("FDCPA") does not apply to debt purchasers whose principal business is not debt collection. Accordingly, in this brief, *amici* seek to provide this Court with information concerning the structure, function, and regulation of the debt markets, the concerns Congress faced when enacting the FDCPA, and why the plain language of the FDCPA—which does not include debt purchasers like respondent as "debt collectors"—flows naturally from those concerns. Through this brief, *amici* also explain the comprehensive government regulatory structure and market incentives already applicable to debt purchasers like respondent, thus belying petitioners' inappropriate policy-based argument that affirmance of the Fourth Circuit's decision would unleash a wave of unfair debt collection practices.

Indeed, rather than vindicating Congress' non-existent concerns, reversal of the Fourth Circuit's decision would sharply expand liability—including a private right of action for borrowers—to many debt purchasers (including *amici*'s members), a result that Congress never intended. Extending the FDCPA's private right of action would, in turn, introduce substantial and unnecessary costs and litigation uncertainty into the sale of debt, and thus disincentivize debt origination in the first place. The end result would be harm to *amici*'s members, the financial system, and individuals, especially those of lesser financial means.

BACKGROUND

"Credit availability is a crucial ingredient in any advanced economy's recipe for economic growth because credit can support investment in productive

enterprises and can smooth household spending from fluctuations in income."[2] Commercial banks, such as *amici*'s members, are among the lenders that provide vital access to this credit, especially for small businesses and individuals.[3] As of December 2016, depository institutions held over $9 trillion in outstanding loans on their balance sheets,[4] including over $1.5 trillion in consumer loans.[5] That does not include the approximately $10 trillion in securitized loans that were originated by various lenders, including banks,[6] and then packaged and sold to

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[2] James McAndrews, Dir. of Research, Fed. Reserve Bank of N.Y., Remarks at the Econ. Press Briefing on Student Loans, Fed. Reserve Bank of N.Y.: Credit Growth and Econ. Activity after the Great Recession (Apr. 16, 2015), https://tinyurl.com/mcandrewscreditgrowth; *see also* Elizabeth A. Duke, Governor, Fed. Reserve Bd. of Governors, Speech: Fostering a Healthy Credit Environment (June 30, 2010) ("Credit plays a critical role in our economy."), https://tinyurl.com/dukehealthycredit.

[3] *See Consumer Credit & Payments Statistics*, Fed. Reserve Bank of Phila. (Oct. 22, 2015), https://tinyurl.com/fedreservestatistics.

[4] Fed. Deposit Ins. Corp. ("FDIC"), *Statistics on Depository Institutions Report—Net Loans and Leases* (Dec. 31, 2016), https://tinyurl.com/fdicstatistics.

[5] Bd. Of Governors of the Fed. Reserve System, *Consumer Credit (G.19) Statistical Release December 2016* (Jan. 2017), https://tinyurl.com/fedreserveconsumercredit. In total, according to the Federal Reserve, "major holders" of debt held $3.7 trillion in consumer loans. *Id.*

[6] Sec. Ind. and Fin. Mkts Ass'n ("SIFMA"), *Statistics: US ABS Issuance and Outstanding, US Mortgage-Related Issuance and Outstanding* (March 20, 2017) ("SIFMA Reports"), https://tinyurl.com/sifmastatistics.

investors, or the large volume of loans originated and sold outside of securitizations.[7] These loans include consumer loans (*e.g.*, credit card loans, auto loans, other personal loans) and residential loans (primarily home mortgages).[8] Because of banks' central role in these vitally important credit markets, economists have recognized that "the impairment of banks' ability to extend credit . . . has the potential to hinder investment and adversely affect the overall economy."[9]

Although the vast majority of consumer debts are paid in their ordinary course,[10] some debts become delinquent. For instance, as of December 31, 2016, "4.8% of outstanding debt was in some stage of delinquency."[11]

Banks obviously "have the responsibility [to their shareholders] to attempt to collect . . . and to recover

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[7] *See, e.g.*, Fed. Trade Comm'n ("FTC"), *The Structure and Practices of the Debt Buying Industry* ii, 7 (Jan. 2013) ("FTC *Structure and Practices*"), https://tinyurl.com/ftcstructureandpractices.

[8] SIFMA Reports, *supra*.

[9] McAndrews, *supra*.

[10] According to one analysis, 95% of all consumer debt is paid on time. DBA Int'l, *The Debt Buying Industry: A White Paper* 6 (Apr. 2015), https://tinyurl.com/dbawhitepaper.

[11] Fed. Reserve Bank of N.Y., *Quarterly Report on Household Debt and Credit* (Feb. 2017), https://tinyurl.com/fedreserve2016Q4 (noting that there was "$607 billion of [household] debt that [wa]s delinquent").

losses associated with . . . bad debt."[12] To meet that responsibility, "[m]ost original creditors try to collect on debts before selling them to others, whether by collecting on the debts themselves, [or] hiring . . . third-party debt collectors."[13] Another option is to sell the non-performing debt to other institutions, which will then seek to collect on it for their own accounts. As of 2013, the 19 largest banking organizations "sold about $37 billion in charged-off debt [on average] . . . in each of the past few years."[14]

As the Federal Trade Commission observed, selling debt permits lenders to recoup billions of dollars on non-performing debt every year, "*thereby allowing creditors to provide more credit at lower prices*" to other borrowers.[15] Banking regulators recognize that "banks can benefit from debt-sale arrangements by turning non[-]performing assets into

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[12] Statement of the Office of the Comptroller of the Currency Provided to the Subcomm. on Fin. Insts. and Consumer Prot., Senate Comm. on Banking, Hous., and Urban Affairs 10 (July 17, 2013) ("OCC 2013 Statement") (footnote omitted), https://tinyurl.com/OCC2013statement; *see also* Office of the Comptroller of the Currency, OCC Bulletin 2014-37 (Aug. 4, 2014) ("OCC Bulletin 2014-37"), https://tinyurl.com/OCC2014bulletin (citing "a responsibility to [banks'] shareholders to recover losses" on charged-off debt).

[13] FTC *Structure and Practices*, *supra*, at 17.

[14] OCC 2013 Statement, *supra*, at 3.

[15] *See* FTC *Structure and Practices*, *supra*, at i (emphasis added) ("Debt buying can reduce the losses that creditors incur in providing credit, thereby allowing creditors to provide more credit at lower prices.").

immediate cash proceeds and reducing the use of internal resources to collect delinquent accounts."[16] Debt purchasers "increase liquidity in the consumer credit system. . . . By selling distressed debt, lenders can convert non[-]performing debt into liquid assets that can be used productively."[17]

There generally are two categories of entities that purchase, and then seek to collect on, non-performing debt: (1) firms whose principal business is debt collection, whether on purchased debt or as a third-party service offered to creditors; and (2) firms that principally engage in other businesses, including lending directly to borrowers. A debt purchaser in the second category, like respondent, Santander Consumer USA Inc. ("Santander"), may purchase non-performing debt as part of a larger pool of loans containing both performing and non-performing debt. *See Henson* v. *Santander Consumer USA, Inc.*, 817 F.3d 131, 134 (4th Cir. 2016).[18] Purchasing such pools may help a financial institution like Santander strengthen its balance sheet, enhance earnings, and

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[16] OCC Bulletin 2014-37, *supra*.

[17] Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, 28 Loy. Consumer L. Rev. 167, 213 (2016) (footnote omitted). A 2013 FTC study observed that the nine largest debt buyers, in a three-year period, purchased nearly 90 million consumer accounts with a face value of $143 billion. *See* FTC, *Structure and Practices*, *supra*, at i-ii.

[18] "The portfolio contained not just defaulted loans . . . but also non-defaulted loans." Resp't Br. 7.

manage capitalization.[19] Financial institutions (like Santander) that originate and service loans, some of which become non-performing, can seamlessly integrate the purchased loans (both performing and non-performing) into their existing portfolios.[20]

SUMMARY OF ARGUMENT

I. A. As Santander's brief ably demonstrates, the FDCPA's plain text does not include debt purchasers if their principal business purpose is not debt collection. This was a deliberate choice on Congress' part. In enacting the FDCPA, Congress did not attempt to apply the statute to all purchasers of debt, but specifically targeted three categories of entities: (i) those that function principally as debt collectors (*i.e.*, independent debt collectors); (ii) those that regularly seek to collect debt owed to *others*; or (iii) those that fail to use their own names when collecting debt. Congress was concerned that those specific categories of entities were engaged in abusive debt

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[19] *See* Jim Reber, *The Case for Buying Loans*, Indep. Banker Magazine 52-53 (Sep. 2009), https://tinyurl.com/icbaloans (explaining that debt purchasers include "institutions looking to deploy capital faster than they could organically, institutions with low loan demand and declining margins, and community banks with excess liquidity due to deposit growth. . . . Buyers end up with a pool of loans that meet their underwriting guidelines and yield requirements. The ability to manage credit risk combined with compelling yields make loans an attractive asset class in today's market.").

[20] *See* Rebecca S. Demsetz, *Bank Loan Sales: A New Look at the Motivations for Secondary Mkt. Activity*, 23 J. Fin. Research 197, 201 (2000) (banks may "use loan sales and purchases to rebalance a portfolio of a given size").

collection practices, because those entities (i) were effectively immune from then-existing regulatory oversight due to, among other things, their proven adeptness at dissolving themselves and reconstituting quickly under a different name, and (ii) had little incentive to maintain positive, ongoing relationships with borrowers.

Accordingly, Congress determined that a federal private right of action on behalf of borrowers was needed to deter and punish those entities and provided for such right in the FDCPA.

By contrast, Congress made the carefully calibrated decision that it did not need to provide borrowers with a private right of action like that provided under the FDCPA against institutions like Santander, which principally engage in businesses other than collecting on debt. These institutions were already subject to meaningful deterrence against abusive practices through what Congress viewed as effective ongoing regulatory supervision, state law remedies, and naturally strong reputational and business incentives to establish or maintain positive, ongoing customer relationships.

B. As a result, the FDCPA does not apply to all institutions that attempt to collect debt from borrowers. Rather, it applies only to a specifically defined group of "debt collectors," as set forth in the statute. As the Fourth Circuit correctly held, that definition plainly does not include entities like Santander, whose principal business is the origination of loans and who also purchase debt and seek to collect on it for their own accounts.

II. Contrary to the parade of horribles presented by petitioners and their *amici*, the Fourth Circuit's decision will not result in an increase of unfair, deceptive, or abusive practices. Financial institutions offering consumer credit services, like Santander, are already effectively constrained by reputational concerns, as well as federal and state laws that Congress identified when it consciously chose not to include such entities as "debt collectors" under the FDCPA.

III. A. Reversal, and extension of the FDCPA to companies like Santander, would instead result in a boon to the "'cottage industry' of litigation that has arisen out of the FDCPA." *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 617 (2010) (Kennedy, J., joined by Alito, J., dissenting). These companies would, in petitioners' view, be labeled "debt collectors" not only when collecting on loans that were in default when purchased, but even when collecting on loans that the companies themselves originated—a dramatic expansion of FDCPA private litigation. Such a result would add legal uncertainty and, therefore, costs for all players in the multi-trillion dollar debt markets.

B. Those added costs would have pernicious systemic effects, thereby rendering credit scarcer and more expensive for all in the debt origination market, and particularly for lower-income individuals, whose debt is more likely to go into default. Further, the threat of FDCPA class action liability may well deter some financial institutions from purchasing debt at all, leaving the specialized debt collectors that Congress targeted in the FDCPA as even bigger

players in the market—exactly the opposite of what Congress intended.

ARGUMENT

As Santander persuasively demonstrates in its brief, the Fourth Circuit's decision is consistent with the plain text of the FDCPA. Resp't Br. 24-33. That plain text arose out of a clear Congressional desire to not apply the statute to debt purchasers like Santander. Reversal would go against legislative purpose and, as a policy matter, would not improve an already effective regulatory framework applicable to debt purchasers such as Santander. Instead, reversal would only serve to benefit class action lawyers at significant cost to consumers and the financial system.

I. THE FOURTH CIRCUIT CORRECTLY INTERPRETED THE FDCPA.

A. Congress Did Not Intend to Include Debt Purchasers Like Santander In the FDCPA.

Though any decision of this Court can begin and end with the plain text of the statute,[21] *amici* herein provide for this Court the basic background of the FDCPA's enactment to help elucidate Congressional intent.

Though debt purchasing was not as prevalent when the FDCPA was enacted in the 1970s,[22] the legislative record demonstrates that Congress made an

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[21] *See* Resp't Br. 24-33.

[22] *See* FTC *Structure and Practices*, *supra*, at 12.

intentional decision not to include in the FDCPA—and thus not to create a private right of action against—debt purchasers whose primary business is not debt collection. In debate preceding passage through the House of a bill that contained materially identical language to what was ultimately included in the FDCPA,[23] Representative Wylie, the ranking minority member of the Subcommittee on Consumer Affairs and one of the introducers of the bill, indicated that a firm in the position of Santander today would not be included in the statute:

> REP. CHAPPELL: Is there anything in the bill against a bank collecting?
>
> REP. WYLIE: No, sir.
>
> REP. CHAPPELL: Would they be prohibited from the same actions? I am concerned about the device which might be used which would take the bill that is owed from the first owner into a collection agency which then becomes a bona fide owner. How do we address that?
>
> REP. WYLIE: *I would say if he becomes a bona fide owner of a debt and his primary business is "not" debt collecting then he is not*

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[23] *See* H.R. 5294, 95th Cong. § 802(f) (1977) ("The term 'debt collector' means any person who engages in any business the principal purpose of which is the collection of any debt, or any person who directly or indirectly collects or attempts to collect a debt owed or due or asserted to be owed or due another, and who uses any instrumentality of interstate commerce in connection with such collections.").

> *covered by the bill. He is not an independent debt collector.*

123 Cong. Rec. H2925 (Apr. 4, 1977) (emphasis added).

This exchange is echoed in the Senate and House reports on the FDCPA, which, as described below, further confirm that Congress did not intend to subject entities like Santander—*bona fide* owners of the debt they seek to collect, and not principally engaged in the debt collection business—to the Act's coverage. The result of Congress' concern was a statute that applies specific deterrent and punishment provisions, including a private right of action, to a targeted set of entities—independent "debt collectors"—and not to financial institutions like Santander, which Congress determined were already deterred from improper behavior by the existing regulatory regime. That is why the House Report, in providing "instructive" "illustrations of those persons who are not intended to be included in the term 'debt collector,'" lists "banks, retailers, credit unions or finance companies." H.R. Rep. No. 131, 95th Cong., 1st Sess. 4 (1977).

Congress carved these entities out for three reasons. First, Congress specifically identified the actions of independent debt collection firms as prompting the need for legislation. The Senate Report explains that "[h]earings before the Consumer Affairs Subcommittee revealed that independent debt collectors are the prime source o[f] e[g]regious collection practices. While unscrupulous debt collectors comprise only a small segment of the

industry, the suffering and anguish which they regularly inflict is substantial." S. Rep. No. 382, 95th Cong., 1st Sess. 2 (1977); *see also* 123 Cong. Rec. S13854 (August 5, 1977) (statement of Sen. Riegle). To Congress, these "[i]ndependent debt collectors constitute[d] an industry separate from creditors. Debt collectors' business is the collection of debts." H.R. Rep. No. 131, *supra*, at 7.

Second, Congress noted that creditors not covered by the FDCPA were "usually larger and more stable," and more susceptible to regulatory deterrence, than independent debt collectors. *Id.* "[I]f a Federal agency such as the Federal Trade Commission takes action against a major creditor, it usually has a deterrent effect throughout the industry. This is not the case with the debt collection industry." *Id.* Indeed, Congress noted "that the [Federal Trade] Commission has had little success regulating debt collectors. . . . . [B]ecause there are so many small debt collection agencies and they can easily go out of business after suit by the Commission, suing 15 or 20 individual debt collection agencies does not change industrywide practices." *Id.*[24]

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[24] *See also* Zywicki, *supra*, at 177 ("First, many lenders, especially financial institutions, were subject to ongoing supervision by banking regulators; thus, their improper practices were thought [by Congress] to be easier to detect and punish than were those of debt collectors. Second, barriers to entry in the industry were low, so it was feared that if a firm was disciplined, its employees could easily form again under a different name or in a different state with minimal effort. Thus, deterrence was thought to be weaker for third-party collectors than for originating creditors."); Robert M. Hunt, *Collecting Consumer Debt in Am.* Phila. Fed. Reserve Bank

Finally, Congress emphasized that "debt collectors" should not include financial institutions that sell products and services to individuals, because such institutions are concerned about their reputations and goodwill. Both the House and Senate Reports identify this as the key distinction between creditors and covered "debt collectors." *See* H.R. Rep. No. 131, *supra*, at 7 ("Independent debt collectors constitute an industry separate from creditors. Debt collectors' business is the collection of debts. Unlike creditors, they do not offer to sell any product or service to consumers."); S. Rep. No. 382, *supra*, at 2 ("Unlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them."); *see also* 123 Cong. Rec. S13854, *supra*. Indeed, petitioners admit that Congress "had in mind" for exclusion from the FDCPA those creditors that "must balance the desire to collect fully on their debts against the need not to alienate existing customers or establish a bad reputation among potential future customers." Pet'rs Br. 34.

Bus. Rev. 20 (Q2 2007) ("The FTC took the position that it was easier for regulators to discipline financial institutions than to discipline debt collectors. It argued that barriers to entry into the collections business were so low that actions taken against existing firms did little to deter the behavior of new firms entering the business. Others argued that financial institutions were already more heavily regulated, and the limited data available at the time suggested that most complaints were about the conduct of the third-party collectors.").

As a practical matter, the decision not to include entities like Santander as "debt collectors" may well have been necessary for the FDCPA's passage: "The act passed by only one vote in the House of Representatives," and, commentators have observed, "if the act had been written to include creditors, it is likely the bill would not have passed."[25]

The fundamental characteristics that led Congress to exclude certain creditors from the FDCPA in 1977 clearly apply to consumer-finance companies like Santander, and to the commercial bank defendants in the Eleventh Circuit and Ninth Circuit cases where the courts also refused to extend FDCPA liability. *See Davidson* v. *Capital One Bank (USA), N.A.*, 797 F.3d 1309 (11th Cir. 2015); *Schlegel* v. *Wells Fargo Bank, NA*, 720 F.3d 1204 (9th Cir. 2013). These companies are not principally engaged in debt collection and instead originate loans as a crucial part of their businesses[26]; are subject to regulation by multiple government agencies[27]; are generally large

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[25] Hunt, *supra*, at 20.

[26] *See, e.g.*, *Henson*, 817 F.3d at 140 (labeling Santander a "consumer finance company" that, *inter alia*, "lends money"); *Davidson*, 797 F.3d at 1311 ("[D]ebt collection is only some part of, and not the principal purpose of, Capital One's business."); *Schlegel*, 720 F.3d at 1209 ("The complaint fails to provide any factual basis from which we could plausibly infer that the principal purpose of Wells Fargo's business is debt collection.").

[27] *See, e.g.*, Santander Consumer USA Holdings Inc., Form 10-K 19-20 (Feb. 28, 2017) ("Santander 2016 10-K"), https://tinyurl.com/santander10k ("We operate in a highly regulated industry and continually changing federal, state, and local laws and regulations could materially adversely affect our business, financial

and stable[28]; sell a broad array of products in the market[29]; and, thus, are concerned about their reputations and goodwill.[30] Accordingly, when these

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condition and results of operations. . . . [W]e are directly and indirectly subject to certain banking and financial services regulations, including oversight by the [Federal Reserve Bank of Boston], the [European Central Bank], and the OCC. . . . From time to time, we are or may become involved in formal and informal reviews, investigations, examinations, proceedings, and information-gathering requests by federal and state government and self-regulatory agencies, including, among others, the [Federal Reserve Bank of Boston], the Consumer Financial Protection Bureau ("CFPB"), the [Department of Justice], the [Securities and Exchange Commission], the FTC and various state regulatory and enforcement agencies."); *see also infra* 27-28 (discussing existing law and regulation).

[28] H.R. Rep. No. 131, *supra*, at 7 ("Creditors, unlike debt collectors, are usually larger and more stable."); *see* Santander Consumer USA, *Overview* (last visited Mar. 22, 2017), https://tinyurl.com/santanderoverview ("Santander Consumer USA Holdings Inc. . . . began originating retail installment contracts in 1997, has a serviced portfolio of more than $40 billion (as of September 30, 2014), [and] has more than two million customers across all credit grades").

[29] Santander 2016 10-K, *supra*, at 6 ("[T]he Company offers a full spectrum of auto financing products and services under the Chrysler Capital brand . . . . The Company also originates vehicle loans through a web-based direct lending program").

[30] *See id.* at 24 ("Our ability to attract consumers is highly dependent upon external perceptions of our level of service, trustworthiness, business practices, and financial condition. Negative publicity about such matters, our alleged or actual practices, or our industry generally could adversely affect our business, financial condition and results of operations, including our ability to retain and attract employees.").

companies purchase debt and collect on it for their own accounts, they are not covered by the FDCPA.

B. As Santander Explains, the Plain Language of the FDCPA Is Fully Consistent with Congressional Intent.

Congress sought to address its specific concerns about debt collection practices by including only independent "debt collectors," a subset of actors in the market, in the FDCPA. Rather than applying the FDCPA to any entity that seeks to collect debt, which would have included every lender, Congress made clear that the FDCPA applies only to: (1) "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts"; (2) "any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another"; or (3) "any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts." 15 U.S.C. § 1692a(6). This specific and exclusive definition of "debt collectors" does not include Santander, which, as a small part of its overall business, purchased a $3.5 billion pool of debt to collect for its *own* account.

Petitioners acknowledge that "[t]here is no claim that Santander falls within the [first] 'principal purpose' definition" of "debt collectors." Pet'rs Br. 16 n.31. Rather, as the Fourth Circuit observed, Santander is "a consumer finance company" that "lends money" and "otherwise engages in borrowing and investing its capital." *Henson*, 817 F.3d at 140.

Likewise, there is no allegation that Santander falls within the third prong of the "debt collector" definition, as Santander did not use any name other than its own in seeking to collect debt.

Petitioners therefore attempt to rely on the FDCPA's second definition of "debt collector." They argue that, even though Santander purchased the relevant debt and was collecting solely for its *own* account, Santander was actually collecting on debt "owed . . . *another*"—*i.e.*, debt that had, at origination, been owed to the originator. Pet'rs Br. 27-33. Petitioners admit, however, that this "may not be the most natural interpretation of the phrase standing in isolation." Pet'rs Br. 26-27. Petitioners' interpretation is indeed unnatural: at the relevant time, when Santander was allegedly collecting on petitioners' debt, the debt was "owed" to Santander, and *not* to the originator. Any other interpretation unreasonably stretches the text. Petitioners' interpretation would also result in a sweeping expansion of the FDCPA to include any purchaser of debt that subsequently sought to collect on any loans that at the time of sale were delinquent, even if the purchaser's principal business is not debt collection. In petitioners' view, such purchaser would be a "debt collector" subject to the FDCPA not just when collecting on debts purchased in default, but even when collecting on loans the lender itself originated.[31]

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[31] *See* Pet'rs Br. 53-56 ("Congress provided that defendants who regularly collect debt 'owed or due another' are debt collectors, full stop. . . . Santander therefore qualifies as a debt collector under the main 'regularly collects' definition, and the Act therefore applies to *all* of its collection efforts . . . ." (emphasis in original)).

It makes a mockery of Congress' effort to tailor carefully its statute for its intended purpose.

Santander's brief compellingly explains why petitioners' interpretation is inconsistent with the plain text of the FDCPA.[32] As Santander explains, "debts owed" and "debts . . . due" are written in the present tense. Resp't Br. 17. If Congress had intended for these phrases to apply to debts owed to the purchasing entity but originated by another entity, it had far simpler ways at its disposal to draft the statute, *e.g.*, by including "debts originated by another" or inserting the word "were" between "debts" and "owed."

Petitioners' reliance on the FDCPA's reference to "debts 'owed' another"—rather than "debts 'owing' another"—and argument that "owed," specifically, should be read to refer to the original creditor, is also without merit. Pet'rs Br. 28 (emphases in original). Indeed, another provision of the FDCPA requires, in certain circumstances, a debt collector to "send the consumer a written notice containing . . . the name of the creditor *to whom the debt is owed*." 15 U.S.C. § 1692g(a)(2) (emphasis added). Petitioners admit, as they must, that a debt purchaser like Santander, and not the originator, would be considered the "creditor to whom the debt is owed" for purposes of this provision. *See* Pet'rs Br. 47 ("It would make sense to require a debt purchaser to inform the debtor that payment of the debt is now due the purchaser . . . .").

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[32] *See* Resp't Br. 15-36.

Unable to explain how Santander qualifies under the FDCPA's specific definition of "debt collector," petitioners proceed backwards from the statute's *exclusion* from "debt collector" status of "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. § 803(6)(F)(iii). Petitioners argue that, for this exclusion to have any effect, the second definition of "debt collector"—"any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another"—must reach debt purchasers who "obtained the debt by assignment after the debt had fallen into default." Pet'rs Br. 48.

Even if petitioners were correct that an exclusion from a statutory definition should dictate whom the definition includes (as opposed to excludes), *but see Dan's City Used Cars, Inc.* v. *Pelkey*, 133 S. Ct. 1769, 1780 (2013), petitioners' argument is based on the fundamental misconception that debt may *only* be "obtained" through outright "purchase." In fact, multiple courts have held that petitioners' critical assumption is *incorrect*: "obtained" under the FDCPA may refer to obtaining a loan for servicing, short of outright purchase. *See Carter* v. *AMC, LLC*, 645 F.3d 840, 843 (7th Cir. 2011) ("At least four courts of appeals, including ours, have concluded that a servicing agent for a mortgage loan 'obtains' the debt even though the bank owns the note."). Thus, when read with a basic understanding of how debt markets work, the statutory exclusion on which petitioners rely is clearly intended to exclude *servicers* of

non-defaulted debt, who would otherwise be included in the FDCPA's definition of "debt collector." There was no need to exclude entities like Santander from the definition of "debt collector," because those entities were not covered by the definition in the first place (regardless of whether the relevant debt was in default or not).

II. FINANCIAL INSTITUTIONS LIKE SANTANDER THAT PROVIDE CONSUMER SERVICES ARE ALREADY SUBJECT TO SEPARATE AND EFFECTIVE REGULATORY REGIMES.

Petitioners and their *amici* argue that extension of the FDCPA is necessary to prevent unfair debt collection practices on defaulted debt by debt purchasers whose principal business is not debt collection. Even if that argument were an appropriate one for this Court—rather than Congress—to resolve, there is no basis for petitioners' fear: debt purchasers whose principal business is not debt collection are already effectively regulated (and have been for decades). The real change petitioners seek has little to do with abusive practices, and much to do with expanding the FDCPA's private right of litigation, thereby extending the "cottage industry" of FDCPA class action litigation into another market.

First, as discussed *supra*, consumer-finance companies like Santander already have strong reputational and business incentives to refrain from abusive practices when collecting debt (whether performing or defaulted). Congress cited those same incentives in explaining why it did not include certain classes of creditors in the FDCPA.

Second, Congress determined that, unlike specialized independent debt collectors, debt purchasers, including consumer finance companies like Santander and other financial entities, were already subject to the deterrent effect of other legal regimes that addressed the abuses petitioners and their *amici* purportedly fear.

For instance, the Federal Trade Commission Act of 1914 ("FTCA") declares unlawful "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1).[33] In enacting the FDCPA, Congress expressed a belief that the FTCA already effectively regulated "major creditor[s]": "[I]f a Federal agency such as the Federal Trade Commission takes action against a major creditor, it usually has a deterrent effect throughout the industry. This is not the case with the debt collection industry." H.R. Rep. No. 131, *supra*, at 7.

Congress has subsequently added other regulatory tools concerning debt purchasers' attempts to collect debt that they have purchased. For example, the Consumer Financial Protection Act of 2010 (Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act) makes it unlawful for "any covered person or service provider . . . to engage in any unfair, deceptive, or abusive act or practice" (or "UDAAP").

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[33] The FTCA empowers the Federal Trade Commission to enforce this provision as to non-banks. 15 U.S.C. § 45(a)(2). The Federal Deposit Insurance Act in turn empowers federal banking agencies to take appropriate enforcement actions against depository institutions and their subsidiaries for violations of any "law, rule, or regulation," including this section of the FTCA. 12 U.S.C. § 1818(b).

See 12 U.S.C. § 5536(a)(1)(B). Contrary to the FDCPA's narrow application to "debt collectors," Title X applies to any "covered person," defined broadly to include "any person that engages in offering or providing a consumer financial product or service." 12 U.S.C. § 5481(6)(A). The Act also empowers the CFPB to bring enforcement actions against covered persons or service providers who are engaged in UDAAPs, and to "prescribe rules" that identify and prevent UDAAPs. 12 U.S.C. § 5531(a)-(b).[34]

These UDAAP provisions further regulate the debt collection activities of financial institutions that are not included in the FDCPA. Indeed, the CFPB has observed that the FDCPA's scope is relatively limited, in contrast to Title X's application to a broader array of financial institutions, including those who primarily offer consumer credit services: "Although the FDCPA's definition of 'debt collector' does not include some persons who collect consumer debt, all covered persons and service providers must

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[34] Courts have determined that no private right of action is created by these provisions. *See, e.g.*, *Beider* v. *Retrieval Masters Creditors Bureau, Inc.*, 146 F. Supp. 3d 465, 471-72 (E.D.N.Y. 2015); *see also infra* 29-31 (discussing the FDCPA private right of action and litigation regime). The CFPB has, however, actively policed the UDAAP provisions through its enforcement authority. *See* Adam D. Maarec and John C. Morton, *A Survey of Activities Identified as Unfair, Deceptive, or Abusive Under the Dodd-Frank Act* 1 (Jan. 25, 2016), http://preview.tinyurl.com/maarecudaap ("Between July 1, 2015 and December 31, 2015, the CFPB engaged in 25 public enforcement actions involving alleged UDAAP violations.").

refrain from committing UDAAPs in violation of the Dodd-Frank Act."[35]

The OCC has also taken an active role in requiring debt sales to be made only to purchasers that comply with applicable consumer protection laws, thereby indirectly regulating debt purchasers. OCC bank examinations "assess management oversight of debt-sale arrangements and focus on compliance with applicable consumer protection statutes," and the OCC has required debt sellers to "[p]erform appropriate due diligence when selecting a debt buyer" and to "[i]mplement appropriate oversight of the debt-sale arrangement."[36]

State regulatory regimes add another layer of protection.[37] As the CFPB states on its website: "Most states have laws about debt collection practices, many of which are similar to the FDCPA. Some of those state laws cover the original creditor, while others don't. States also have Unfair and Deceptive Acts and Practices laws that may apply to

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[35] *See* CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts (July 10, 2013), https://tinyurl.com/cfpb2013bulletin.

[36] OCC Bulletin 2014-37, *supra*.

[37] Some courts have held that state debt collection laws generally are not preempted by federal statutes or regulation. *See Aguayo* v. *U.S. Bank*, 653 F.3d 912, 916 (9th Cir. 2011) (state laws "directed toward debt collection . . . not preempted by the [National Bank Act]"); *Epps* v. *JPMorgan Chase Bank, N.A.*, 675 F.3d 315, 325-26 (4th Cir. 2012) (same).

debt collection."[38] More specifically, "[a]bout twelve [states] have comprehensive laws regulating the debt collection process" which "regulate . . . both creditors and independent collection agencies," and, "[u]nlike the [FDCPA], [these] comprehensive state debt collection laws generally apply to merchants and other commercial entities attempting to collect their own debts."[39]

Petitioners and their *amici* emphasize that not *all* states regulate debt collection by debt purchasers like Santander. But that reflects a deliberate, democratic choice by those states, and not a gap that a federal law should be stretched to fill. The undisputed fact that many states *do* regulate in this area only confirms that fears of increased abusive practices are unfounded.

III. REVERSAL WOULD INCREASE COSTS IN THE DEBT SALE AND ORIGINATION MARKETS, AND WOULD HARM THE FINANCIAL SYSTEM AND CONSUMERS.

A. Reversal Would Introduce a Costly Litigation "Cottage Industry" Into an Already Well-Regulated Arena.

Why are petitioners pushing this case? The answer is simple: applying the FDCPA to creditors like Santander would open them up to the FDCPA's

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[38] Consumer Fin. Prot. Bureau, *Ask CFPB: Debt Collection* (last visited Mar. 24, 2017), http://tinyurl.com/cfpbdebtcollection.

[39] 2 Consumer Law Sales Practices and Credit Regulation § 632 (updated Sept. 2016).

private right of action (including class actions), and thus give plaintiffs' lawyers an entirely new set of targets. Indeed, in petitioners' view, creditors like Santander would be subject to "debt collector" status not only when they collect on debts purchased in default, but even when they collect on debt they themselves originated, a massive expansion of FDCPA private litigation.

Members of this Court have observed an "already troubling dynamic" under the FDCPA "of allowing certain actors in the system to spin even good-faith, technical violations of federal law into lucrative litigation, if not for themselves then for the attorneys who conceive of the suit." *Jerman*, 559 U.S. at 617 (Kennedy, J., joined by Alito, J., dissenting) ("The case illustrates how a technical violation of a complex federal statute can give rise to costly litigation with incentives to settle simply to avoid attorney's fees."). A "'cottage industry' of litigation . . . has arisen out of the FDCPA," and attorney's fee awards and damages have become divorced from any "assessment of the suit's utility." *Id.*

Other courts have made similar observations. One district court judge recently lamented:

> In this Court, . . . and I suspect in many others, the use of the [FDCPA] has evolved into something quite different than its original purpose would suggest. The majority of cases that I see under the statute are brought by a handful of the same lawyers, based on complaints that read

> much more like legal briefs than complaints. . . .
>
> These cases are often brought for the non-salutary purpose of squeezing a nuisance settlement and a pittance of attorneys' fees out of a collection company, which it will often find cheaper to pay than to litigate. A cottage industry among limited players—plaintiffs' lawyers, debtors, and even defendants' lawyers—appears to be the primary progeny of the statute. . . .
>
> Thus, despite misgivings as to what this statute has become, this Court has applied the statute, to the best of its ability, according to its language and the controlling case law that construes it, leaving it to Congress or higher courts to correct any excess application of the statute.

Huebner v. *Midland Credit Mgmt.*, 85 F. Supp. 3d 672, 673 (E.D.N.Y. 2015); *see also Fed. Home Loan Mortg. Corp.* v. *Lamar*, 503 F.3d 504, 513-14 (6th Cir. 2007) ("Ironically, it appears that it is *often the extremely sophisticated consumer who takes advantage of the civil liability scheme defined by this statute, not the individual who has been threatened or misled.* The cottage industry that has emerged does not bring suits to remedy the 'widespread and serious national problem' of abuse that the Senate observed in adopting the legislation . . . . Rather, the inescapable inference is that the judicially developed standards have enabled a class of professional plaintiffs." (emphasis in original) (quoting, and

"echo[ing] sentiments and concerns" expressed in *Jacobson* v. *Healthcare Fin. Servs.*, 434 F. Supp. 2d 133, 138-39 (E.D.N.Y. 2006))).[40]

Extension of this problematic litigation regime to debt purchasers like Santander, which are already subject to effective regulatory and reputational constraints, would provide no benefit, but impose heavy costs. As discussed in the next section, those costs would be borne not just by the debt purchasers, but by borrowers as well.

B. Extending FDCPA Liability to Debt Purchasers Like Santander Would Harm Individuals and the Financial System.

Petitioners suggest that there is something inherently suspicious about buying "defaulted" debt—highlighting, for example, that such debt is often purchased for "pennies on the dollar" by firms that then "seek to collect on purchased debts themselves." Pet'rs Br. 8 (quotation omitted). But what petitioners deem suspicious is the effective working of the marketplace: as discussed *supra*, sales and purchases of non-performing debt can reduce lender losses, help maintain systemic liquidity, and make credit more accessible and cheaper. Introducing the prospect of

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[40] *See also* Note, William P. Hoffman, *Recapturing the Congressional Intent Behind the Fair Debt Collection Practices Act*, 29 St. Louis U. Pub. L. Rev. 549, 550 (2010) ("[A]n onslaught of litigation has ensued, pitting the unwitting consumer against the often fair and honest collector. In the end, the losers are creditors, consumers, and the taxpayers who support our courts, suffering at the expense of consumer-advocacy attorneys.")

FDCPA class action liability to financial institutions like Santander would make it costlier for them to participate in the debt purchase market, reducing market participation and lowering the price purchasers are willing to pay for offered debt—or quite possibly making them unwilling to purchase it at any price—with negative systemic effects.

First, the threat of being labeled a "debt collector" subject to FDCPA liability for buying any loans that are in default at the time of purchase naturally would discourage financial institutions from purchasing such loans. This result would have significant effects upstream in the debt origination market, where originators will raise interest rates on—or pull back entirely from—loans with a higher risk of default due to reduced liquidity, *i.e.*, the increased difficulty of selling those loans.

If a lender is "unable to accurately price the risk of [a] loan . . . then the lender will reduce its risk exposure either by lending to fewer borrowers, in particular by limiting credit offered to higher-risk borrowers, or by lending less to the same borrowers by reducing credit lines and loan size. . . . Because at the time of making a loan a lender cannot perfectly predict which particular borrowers will eventually default, *all* potential borrowers will be forced to pay higher costs for credit, but especially riskier borrowers."[41] Individuals unable to access credit through traditional financial institutions will be

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[41] Zywicki, *supra*, at 183-84 (footnote omitted) (emphasis in original).

required to "turn to more expensive and less preferred alternatives such as payday loans or pawnshops."[42]

Second, attaching potential FDCPA liability to any defaulted loans purchased by a financial institution that is not principally engaged in debt collection but who regularly seeks to collect on its own behalf on the debt it has purchased would raise transaction costs in sales of *all* debt—whether current or in default. The FDCPA nowhere defines what it means for a loan to be "in default," and the definition proposed by petitioners—"A loan is generally understood to go into 'default' within the meaning of the FDCPA only after a period of persistent nonpayment," Pet'rs Br. 45 n.47—hardly offers clarity. Nor does the court of appeals decision that petitioners cite for this standard, *Alibrandi* v. *Fin. Outsourcing Servs., Inc.*, 333 F.3d 82, 86-87 (2d Cir. 2003), offer a clear standard: it explains that "judicial decisions and regulations reflect inconsistent periods of time preceding default," though "they all agree that default does not occur until well after a debt becomes outstanding." *Id.* at 87.

The result, at least until there is a clear national standard, will be a rash of litigation about whether debt that was delinquent at the time of purchase formally reached a state of "default." As in *Alibrandi*, that may turn on a loan-by-loan, fact-specific inquiry, including the history of communications between the originator and the

---

[42] *Id.* at 188.

borrower. *See id.* at 88. Recognizing this threat, debt sellers and purchasers may be forced to sift through large pools of loans[43] (a $3.55 billion portfolio in this case) to try to identify those that may be in "default" so that those loans could be removed or re-priced to reflect their greater litigation risk. The increased transaction costs will end up reflected in higher prices for, and reduced availability of, credit for individuals.[44, 45]

Third, all these costs may cause financial institutions that do not specialize in debt collection to reduce their purchases of debt, or simply forego debt purchases altogether. That would be a perverse result. As discussed *supra*, financial institutions

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[43] The FTC *Structure and Practices* report discusses 5,000 portfolios of debt, with a combined total of 90 million loans, an average of 18,000 loans per portfolio. *See* FTC *Structure and Practices*, *supra*, at T-2.

[44] For instance, if debt buyers require debt sellers to indemnify them against the inclusion of defaulted debt within a pool of loans—and thus against class actions of uncertain scope and size that would result if the Fourth Circuit's decision is reversed—debt sellers may not be willing to take on the additional risk and cost, and may curtail lending as a result.

[45] Further, reversal would have the unintended consequence of harming the relationship between lenders and individual borrowers. For instance, a bank representative leaving a voicemail for a borrower whose credit is in default may be required under the FDCPA to identify as a debt collector and provide a "mini-Miranda warning." *See* 15 U.S.C. § 1692e(11); Hoffman, *supra* at 563-65 (discussing "precarious" and "uncertain" case law). As a result, that borrower would be more reluctant to communicate with his creditor at the very time such communication is most important.

offering consumer credit services, like Santander, respond to the same reputational and regulatory incentives that Congress cited in excluding those and certain other kinds of creditors from the FDCPA, and are wholly unlike the specialized debt collectors that prompted Congress to enact the statute. The FDCPA should not be used as a tool to drive loan collections to the very entities whose practices the FDCPA sought to constrain.

CONCLUSION

For the foregoing reasons, and those stated in the Brief for the Respondent, the Court should affirm.

Respectfully submitted.

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Supreme Court of the United States

RICKY HENSON, IAN MATTHEW GLOVER, KAREN PACOULOUTE, F/K/A KAREN WELCOME KUTEYI, AND PAULETTE HOUSE,

Petitioners,

v.

SANTANDER CONSUMER USA, INC., COMMERCIAL RECOVERY SYSTEMS, INC., AND NCB MANAGEMENT SERVICES, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR JEROME N. FRANK LEGAL SERVICES ORGANIZATION AT YALE LAW SCHOOL, EAST BAY COMMUNITY LAW CENTER, AND ECONOMIC JUSTICE PROJECT OF NOTRE DAME CLINICAL LAW CENTER AS *AMICI CURIAE* SUPPORTING PETITIONERS

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Bragdon v. Abbott, 524 U.S. 624 (1998) 28

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Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012) 23

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Fed. Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27 (1981) 28

Fed. Exp. Corp. v. Holowecki, 552 U.S. 389 (2008) 31

Fed. Trade Comm'n v. Check Investors, Inc., 502 F.3d 159 (3d Cir. 2007)..... 16

Fed. Trade Comm'n v. Colgate-Palmolive Co., 380 U.S. 374 (1965) 22

Order for Permanent Inj. and Monetary J., *Fed. Trade Comm'n v. Green Tree Servicing LLC*, No. 0:15-cv-02064 (D. Minn. Apr. 23, 2015) 16

Goodin v. Bank of America, N.A., 114 F. Supp. 3d 1197 11

Hoehn v. FCC Finance, LLC, 126 F. Supp. 3d 472 (D.N.J. 2015) 12

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Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480 (M.D. Ala. 1987)..... 25, 29

Magee v. Portfolio Recovery Assocs., LLC, No. 12-cv-1624, 2016 WL 2644763 (N.D. Ill. May 9, 2016), *reconsideration denied*, 2016 WL 4765682 (N.D. Ill. Sept. 13, 2016)..... 19

McMahon v. LVNV Funding, LLC, 744 F.3d 1010 (7th Cir. 2014) 22

NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995) 23

Nelson v. Santander Consumer USA, Inc., 931 F. Supp. 2d 919 (W.D. Wis. 2013), *vacated on joint motion and stipulation*, 2013 WL 5377280 (W.D. Wis. June 7, 2013) 11

Schlegel v. Wells Fargo Bank, N.A., 720 F.3d 1204 (9th Cir. 2013) 12, 13

Schlosser v. Fairbanks Capital Corp., 323 F.3d 534 (7th Cir. 2003) 29

Serna v. Law Office of Joseph Onwuteaka, P.C., 732 F.3d 440 (5th Cir. 2013)..... 7

Skidmore v. Swift & Co., 323 U.S. 134 (1944)..... 22, 23, 28, 34

Tcherepnin v. Knight, 389 U.S. 332 (1967)..... 7

United States v. Mead Corp., 533 U.S. 218 (2001) ..... *passim*

Court Filings

Amicus Brief of the Fed. Trade Comm'n Supporting Rehearing En Banc, *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309 (11th Cir. 2015), 2015 WL 5608572 ..... 29, 31, 32

Mem. in Support of Pl.'s *Ex Parte* Appl. for TRO, *Fed. Trade Comm'n v. Asset & Capital Mgmt. Grp.*, No. 13-cv-5267 (C.D. Cal. July 23, 2013) 17

Second Am. Compl., *Fed. Trade Comm'n v. Capital City Mortg. Corp.*, No. 1:98-cv-237 (D.D.C. Apr. 17, 2002) 21

Compl., *Fed. Trade Comm'n v. EMC Mortg. Corp.*, No. 08-cv-338 (E.D. Tex. Sept. 9, 2008) 8

Compl., *Fed. Trade Comm'n v. Fairbanks Capital Corp.*, No. 0:03-cv-12219 (D. Mass. Nov. 12, 2003) 21

Compl., *Fed. Trade Comm'n v. Green Tree Servicing LLC*, No. 0:15-cv-02064 (D. Minn. Apr. 21, 2015) 15, 21

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Statutes

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S. Rep. No. 111-176 (2010) 33

Administrative Materials

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Christopher Koegel, Assistant Dir. of Div. of Fin. Practices, Fed. Trade Comm'n, *Think Your Company's Not Covered by the FDCPA? You May Want To Think Again* (Dec. 8, 2015) 25

Consent Order, *Discover Bank*, CFPB No. 2015-CFPB-0016 (July 22, 2015) 10

Consumer Fin. Prot. Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2012* (Mar. 2012) 32

Consumer Fin. Prot. Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2016* (Mar. 2016) 5, 6, 31, 34

Consumer Fin. Prot. Bureau, *Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered* (July 28, 2016) 27

Debt Collection (Regulation F): Advanced Notice of Proposed Rulemaking, 78 Fed. Reg. 67,848 (proposed Nov. 12, 2013) 27

Defining Larger Participants of the Consumer Debt Collection Market, 77 Fed. Reg. 65,775 (Oct. 31, 2012) 27, 29

Fed. Trade Comm'n, *Collecting Consumer Debts: The Challenges of Change* (Feb. 2009) 25, 33

Fed. Trade Comm'n, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* (July 2010)..... 26

Fed. Trade Comm'n, Staff Opinion Letter, Fair Debt Collection Practices Act (Nov. 22, 1988), 1988 WL 1098780 ..... 24, 25, 31

Fed. Trade Comm'n, *The Structure and Practices of the Debt Buying Industry* (Jan. 2013).....*passim*

Off. of the Comptroller of the Currency, OCC Bull. 2014-37, *Consumer Debt Sales: Risk Management Guidance* (Aug. 4, 2014)..... 34

Uniform Retail Credit Classification and Account Management Policy, 65 Fed. Reg. 36,903 (June 12, 2000) 30

Other Authorities

David Reid, Dir. of Gov't Affairs & Policy, Debt Buyers' Ass'n Int'l, *The Debt Buying Industry* (Apr. 2015)..... 35

FCC Fin., LLC, *About Us*, http://www.fccfinance.com/about-us 12

HousingWire, *Green Tree Gone; Ditech Merger Complete* (Sept. 2, 2015), http://www.housingwire.com/articles/34970-green-tree-gone-ditech-merger-complete 16

Nilson, *Top Buyers of Credit Card Debt 2013* (May 2014) 14

Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action Against the Two Largest Debt Buyers for Using Deceptive Tactics To Collect Bad Debts (Sept. 9, 2015)..... 19

Press Release, Fed Trade Comm'n, Auto Lender Will Pay $5.5 Million To Settle FTC Charges It Harassed Customers, Collected Amounts They Did Not Owe (May 29, 2014)..... 9

Press Release, Fed. Trade Comm'n, Bear Stearns and EMC Mortgage To Pay $28 Million To Settle FTC Charges of Unlawful Mortgage Servicing and Debt Collection Practices (Sept. 9, 2008)..... 9

Press Release, Fed. Trade Comm'n, FTC Returns Almost $4 Million to Consumers in Debt Collection Scam (June 30, 2015)..... 17

U.S. Gov't Accountability Off., GAO-09-748, *Credit Cards: Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology* (Sept. 2009) 33, 35

INTEREST OF *AMICI CURIAE*

The **Jerome N. Frank Legal Services Organization at the Yale Law School** ("LSO") is a legal clinic in which law students, supervised by faculty attorneys, provide legal assistance to individuals who cannot afford private counsel. The Mortgage Foreclosure Litigation Clinic (the "Clinic"), part of LSO, has been representing homeowners fighting foreclosure in Connecticut since 2008. Many of the Clinic's clients face unscrupulous debt collection practices from mortgage servicers and debt collectors during the foreclosure process; large, diversified consumer finance companies are responsible for much of this misconduct. The Clinic has appeared in state and federal court proceedings at both the trial and appellate levels and filed amicus briefs with this Court and the United States Court of Appeals for the Second Circuit, as well as with appellate courts in Connecticut, Florida, North Carolina, California, and Maine. The students of the Clinic are among the authors of this brief.[1]

The **East Bay Community Law Center** ("EBCLC") is the UC Berkeley School of Law's community-based teaching clinic and a nationally recognized provider of legal services to low-income residents of the San Francisco Bay Area. EBCLC's Consumer Justice Clinic—whose students are among the

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs in support of either party have been filed with the Clerk.

authors of this brief—operates a legal clinic that reaches thousands of East Bay residents annually, including hundreds who seek legal help because they are facing debt collection lawsuits. Many of these consumers are victims of illegal actions under the FDCPA, and the great majority of the violations are committed by debt buyers, including diversified businesses that occasionally purchase portfolios of debt in order to collect them. Exempting such part-time debt buyers from the FDCPA would effectively condone abusive behavior that is otherwise prohibited by federal law.

The **Economic Justice Project of Notre Dame Clinical Law Center** ("EJP") represents low and moderate income clients in disputes with debt collectors. In addition, the EJP works regularly with local charitable organizations assisting their clients in financial literacy. As part of that work, the EJP advises and educates consumers on debt collection issues. The broad applicability of the Fair Debt Collection Practices Act is essential to the clients and consumers whom the EJP serves.

SUMMARY OF ARGUMENT

The Fair Debt Collection Practices Act ("FDCPA") regulates the collection of consumer debts "to eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). A "debt collector" is defined, in relevant part, to be "any person * * * the principal purpose of [whose business] is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." *Id.* § 1692a(6). As Petitioners note, the phrase "owed or due another" is ambiguous: it could refer to the time of origination or the time of collection. Pet'rs' Br. 19. But, in light of the statute's structure and purpose, the better reading is that debt is "owed" the originator. *See id.* at 19-21.

This reading of the Act is further supported by the consequences that would flow from the Fourth Circuit's alternative approach and by federal agencies' longstanding interpretation of the FDCPA.

First, if this Court adopts the Fourth Circuit's reasoning, consequences antithetical to the FDCPA's purpose would follow. Most notably, the FDCPA would no longer cover certain diversified entities—those that "regularly collect[]" debt but whose "principal purpose" is not debt collection—with respect to debt they own. That change would undermine the FDCPA's purpose because recent enforcement history shows that diversified financial institutions engage in abusive debt collection practices when they purchase and collect on defaulted loans, just as Santander did here.

The Fourth Circuit's reading, moreover, creates a blueprint for debt collectors to escape the Act's

requirements through strategic diversification and creative purchasing arrangements. Specifically, entities whose "principal purpose" is buying and collecting on defaulted debt could escape FDCPA coverage by strategically merging with non-debt-buying entities. Because the Fourth Circuit's reading exempts those who "regularly collect" debt they own, but not those whose "principal purpose" is to collect debt they own, a merger would skirt the Act. This is troubling given the misconduct of "principal purpose" debt collectors in recent years. Additionally, debt servicers that "regularly collect" defaulted debt on behalf of others could instead purchase that debt, as Santander did in this case. On the Fourth Circuit's reading, the collecting entity could escape liability by structuring transactions as debt purchases rather than as servicing assignments.

The Consumer Financial Protection Bureau ("CFPB") has received more complaints about the debt collection industry than about any other industry, and the FDCPA protects some of the nation's most vulnerable consumers against this industry's misconduct. Yet the Fourth Circuit's reading puts form over function, allowing savvy firms to opt out of FDCPA coverage. Congress did not intend so flimsy a statutory scheme.

Second, the two federal agencies charged with general administration and enforcement of the FDCPA have consistently interpreted Section 1692a(6) to include debt collectors that acquired debt in default. These agencies—the Federal Trade Commission ("FTC") and the CFPB—have substantial specialized expertise in the regulation of debt collection. And they have reiterated this interpretation across decades of enforcement actions, policy deci-

sions, and industry guidance. When Congress provides agencies with broad enforcement and rulemaking authority, the agencies' interpretations should receive considerable analytic weight in judicial interpretations of the FDCPA.

As providers of direct legal services to consumers—many of whom have faced abusive debt collection practices and benefited from the FDCPA's protections—*amici* are keenly aware of just how much the Fourth Circuit's reasoning conflicts with congressional purpose, longstanding agency practice, and common sense. The Fourth Circuit's judgment should accordingly be reversed.

ARGUMENT

I. The Fourth Circuit's Interpretation Undermines The FDCPA's Purpose By Exempting A Class Of Debt Buyers Long Understood To Be Covered By The Act And By Creating A Blueprint For Additional Debt Buyers To Evade The Act.

Congress enacted the FDCPA to eliminate widespread abusive debt collection practices. 15 U.S.C. § 1692(a), (e); *see also Barany-Snyder v. Weiner*, 539 F.3d 327, 333 (6th Cir. 2008) ("[T]he FDCPA is extraordinarily broad, crafted in response to what Congress perceived to be a widespread problem.") (internal quotation marks omitted). The need for robust protections against abusive debt collection practices remains urgent. The CFPB received over 85,200 debt collection complaints in 2015, "making debt collection the largest source of consumer complaints." *See* Consumer Fin. Prot. Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2016*,

at 3 (Mar. 2016)[2] [hereinafter *CFPB 2016 Report*]. In the same year, the CFPB brought or resolved seventeen separate enforcement actions under the FDCPA. *Id.* at 27. The FTC brought or resolved an additional eighteen enforcement actions under the FDCPA—the highest number of actions in any single year of the agency's history. *Id.* at 38. These enforcement actions yielded $360 million in consumer relief and $79 million paid into a civil penalty fund. *Id.* at 27. In addition to these public actions, nearly 12,000 suits under the FDCPA were filed by private litigants. *Id.* at 15.

If the Fourth Circuit's interpretation is accepted, a class of debt collectors that has long been understood to fall within the Act would receive an immediate exemption from FDCPA coverage. Specifically, the Fourth Circuit's reading concerns entities that purchase debt in default that they then collect ("debt buyers"). The Fourth Circuit would exclude from FDCPA coverage debt buyers that purchase and "regularly collect" on defaulted debt, but that are not principally engaged in debt collection. Respondent seeks to soften this outcome by contending that the "worst" debt buyers are those whose "principal purpose * * * is the collection of any debts," and that they remain covered under its interpretation. *See* Br. in Opp. 5 (distinguishing "principal purpose" debt collectors from "full-service consumer-finance companies like Santander"). However, recent history shows that part-time debt buyers and "full-service

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[2] Available at http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf [http://perma.cc/F893-KY8Q].

consumer finance companies" engage in the same practices that animated enactment of the FDCPA.

Further, the Fourth Circuit's reading provides a blueprint for debt collectors to escape coverage. "Principal purpose" debt buyers could evade the Act by strategically diversifying into lending and servicing; some of the industry's worst players have already begun this process. Similarly, the Fourth Circuit's reading incentivizes entities that service delinquent debt to buy their way out of FDCPA regulation, as Santander did here. That is, servicers and lenders could structure servicing arrangements as "purchases," thus permitting entities to elude the constraints of the FDCPA.

The Fourth Circuit's reading would undermine the FDCPA's "broad remedial scope." *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 445 & n.11 (5th Cir. 2013) (emphasis omitted) (collecting cases and evidence of legislative intent); *see also Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) ("[R]emedial legislation should be construed broadly to effectuate its purposes."). This Court should reject that interpretation.

A. The Fourth Circuit's interpretation exempts from FDCPA coverage debt buyers that have consistently been held accountable for abusive collection behaviors.

Companies that purchase defaulted debt but are not principally engaged in debt collection have been held accountable for abusive collection practices in numerous public and private actions under the FDCPA. If "owed * * * another" is interpreted to re-

fer to the time of collection, however, these entities will evade regulation under the Act.

Respondents contend that, when Congress enacted the FDCPA, it only sought to regulate purchasers of defaulted debt when the purchaser's "principal purpose * * * is the collection of any debts." *See* Br. in Opp. 23. But Respondent's formulation would contravene the Act's purpose, given the many instances when "regularly collects" debt buyers engage in abusive collection behaviors despite their purported "incentives to cultivate their standing in the community." *Id.* at 5.

1. FTC and CFPB enforcement efforts shed light on the abusive debt collection practices conducted by organizations that buy defaulted debt in addition to their other commercial activities.

On the eve of the 2008 financial crisis, the FTC brought FDCPA claims against investment bank Bear Stearns and its wholly-owned subsidiary EMC Mortgage. *See* Compl. at 1-2, *Fed. Trade Comm'n v. EMC Mortg. Corp.*, No. 08-cv-338 (E.D. Tex. Sept. 9, 2008).[3] The FTC alleged that Bear Stearns and EMC bought mortgages already in default and (a) falsely represented debt amounts, (b) collected inflated debt amounts, (c) intentionally annoyed or harassed consumers through phone calls, and (d) failed to notify consumers of their baseline FDCPA rights, including their rights to verify the debt and to obtain the name of the original creditor. *Id.* at 9-12. The case ended in settlement, with Bear

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[3] Available at http://www.ftc.gov/sites/default/files/documents/cases/2008/09/080909emcmortgagecmplt.pdf [http://perma.cc/N94H-D8HQ].

Stearns and its subsidiary paying $28 million to redress aggrieved consumers. *See* Press Release, Fed. Trade Comm'n, Bear Stearns and EMC Mortgage To Pay $28 Million To Settle FTC Charges of Unlawful Mortgage Servicing and Debt Collection Practices (Sept. 9, 2008).[4]

In 2014, the United States, acting upon "notification and authorization" by the FTC, brought FDCPA claims against Consumer Portfolio Services, Inc., a major subprime auto lender that also engages in delinquent debt purchasing and collecting. Compl. at 1, 3, *United States v. Consumer Portfolio Servs., Inc.*, No. 14-cv-819 (C.D. Cal. May 28, 2014).[5] The complaint alleged that Consumer Portfolio Services attempted to collect on its defaulted loan purchases by (a) asking neighbors to place notes on consumers' doors, (b) calling consumers "liars" and claiming "the tow truck is just around the corner" when in fact repossession was neither imminent nor likely, and (c) debiting consumer accounts without authorization, which sometimes caused unnecessary bank fees. *Id.* at 8-11. The resulting $5.5 million settlement with Consumer Portfolio Services included $3.5 million of consumer account refunds and adjustments. *See* Press Release, Fed. Trade Comm'n, Auto Lender Will Pay $5.5 Million To Settle FTC Charges It Harassed

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[4] Available at http://www.ftc.gov/news-events/press-releases/2008/09/bear-stearns-and-emc-mortgage-pay-28-million-settle-ftc-charges [http://perma.cc/3RSK-4D7X]

[5] Available at http://www.ftc.gov/system/files/documents/cases/140529cpscmpt.pdf [http://perma.cc/DMX5-6K7N]

Consumers, Collected Amounts They Did Not Owe (May 29, 2014).[6]

In 2015, the CFPB issued a consent order against Discover Bank for allegedly engaging in debt collection tactics that violated the FDCPA. *See* Consent Order at 1, *Discover Bank*, CFPB No. 2015-CFPB-0016 (July 22, 2015).[7] The CFPB asserted that Discover acquired a portfolio of thousands of defaulted student loans from Citibank and, in attempting to collect on those loans, failed to provide consumers with specific information about the amount and source of their debts. *Id.* at 10-11. The consent decree required Discover to pay $18.5 million for its illegal student loan practices, including its FDCPA violations; $16 million went directly to consumer victims. *Id.* at 15, 19.

These abusive debt collection practices involved companies that, like Santander, purchase defaulted debt but are not principally engaged in debt collection. Yet the Fourth Circuit's reading would leave the FTC and the CFPB impotent to act in identical situations in the future.

2. Private actions further expose the unjustifiable part-time debt buyer exemption that the Fourth Circuit's interpretation creates. *Cf.* S. Rep. No. 95-382, at 5 (1977) (indicating Congress's intent that

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[6] Available at http://www.ftc.gov/news-events/press-releases/2014/05/auto-lender-will-pay-55-million-settle-ftc-charges-it-harassed [http://perma.cc/N22Q-Y7GF].

[7] Available at http://files.consumerfinance.gov/f/201507_cfpb_consent-order-in-the-matter-of-discover-bank-student-loan-corporation.pdf [http://perma.cc/5LZL-896N]

"consumers who have been subjected to debt collection abuses [to] enforce[e] compliance").

In *Nelson v. Santander Consumer USA, Inc.*, 931 F. Supp. 2d 919, 924 (W.D. Wis. 2013), *vacated on joint motion and stipulation*, 2013 WL 5377280 (W.D. Wis. June 7, 2013), Santander serviced Heather Nelson's defaulted auto loan before proceeding to purchase her loan. Ms. Nelson instructed Santander to communicate with her solely in writing. Yet, over a one-year period, Santander called Ms. Nelson over 1,000 times at a number she had never given Santander. Santander also left Ms. Nelson 116 prerecorded voice messages over that same period, including for ten months after Santander repossessed one of Ms. Nelson's trucks. A federal district court denied Santander's motion for summary judgment, in which Santander had contended that it was not a debt collector under the FDCPA. *Id.* at 925.

In *Goodin v. Bank of America, N.A.*, 114 F. Supp. 3d 1197, 1201-1204 (M.D. Fla. 2015), Bank of America acquired Ronald and Deborah Goodin's defaulted mortgage. Despite being informed numerous times that the Goodins' mortgage payments were being held in bankruptcy court, Bank of America repeatedly and incorrectly notified the Goodins that they were in default before then forcing them into foreclosure. Bank of America's debt collection, which caused the Goodins severe emotional distress, continued until the Goodins filed a lawsuit with FDCPA claims. The court determined that Bank of America was a debt collector. *Id.* at 1205. The court then entered a $204,000 judgment against Bank of America for FDCPA and related state statute violations. *Id.* at 1216.

In *Hoehn v. FCC Finance, LLC*, FCC Finance, a subprime home improvement lender,[8] allegedly purchased a defaulted debt and attempted to collect on that debt through "repeated harassing phone calls" to Joann Hoehn's cell phone. 126 F. Supp. 3d 472, 473 (D.N.J. 2015). Ms. Hoehn contended that she had paid the debt 13 years earlier. *Id.* The court denied FCC Finance's motion for summary judgment despite FCC Finance's argument that it did not acquire the debt "solely in order to facilitate collection for another" and therefore did not meet the requirements of Section 1692a(6). *Id.* at 476-77.

Where courts have applied the Fourth Circuit's interpretation, however, consumers have been without remedy for these abuses.

In *Schlegel v. Wells Fargo Bank, N.A.*, a case analogous to *Goodin*, Wells Fargo acquired John and Carol Schlegel's defaulted mortgage and entered into a modification agreement. 720 F.3d 1204, 1206 (9th Cir. 2013). The Schlegels alleged that Wells Fargo then repeatedly and incorrectly notified the Schlegels that they were in default and threatened to foreclose on the Schlegels' home; these actions worsened Mr. Schlegel's pre-existing PTSD. *Id.* at 1206-07. Wells Fargo continued to pursue its debt until the Schlegels filed a lawsuit with FDCPA claims, at which point Wells Fargo belatedly acknowledged its mistakes. *Id.* Wells Fargo's actions would have violated the FDCPA's prohibitions on false representations and unfair practices, *see* 15 U.S.C. §§ 1692e,

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[8] *See* FCC Fin., LLC, *About Us*, http://www.fccfinance.com/about-us [http://perma.cc/5WYW-5NN7].

1692f, but the Ninth Circuit interpreted "owed * * * another" to refer to the time of collection rather than origination and therefore determined that Wells Fargo was not a debt collector under the Act, *Schlegel*, 720 F.3d at 1210.

In *Davidson v. Capital One Bank, N.A.*, Capital One allegedly bought over $1 billion of defaulted credit card debt and then "robo-signed" "mass-produced" lawsuits seeking false debt amounts. 797 F.3d 1309, 1311-12 (11th Cir. 2015). The named plaintiff Keith Davidson alleged that, just months after buying his defaulted debt, Capital One sued him for more than twice the amount of his actual debt. *Id.* at 1311. But Capital One escaped FDCPA coverage by virtue of its diversified business structure. *See id.* at 1317 ("The amended complaint provides a basis from which we can plausibly infer that *some* part of Capital One's business is debt collection, but it fails to provide any basis from which we could plausibly infer that the 'principal purpose' of Capital One's business is debt collection.") (emphasis in original).

Like the aforementioned agency enforcement actions, these private lawsuits involve companies that purchase defaulted debt but are not principally engaged in debt collection. Consumers could not bring these claims under the Fourth Circuit's definition of debt collector.

As delinquent debt buying and collecting has evolved from a niche specialty of "principal purpose" debt buyers to a province of large companies,[9] the

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[9] For example, the country's largest purchaser of delinquent credit card debt, Sherman Financial Group LLC, is a diversified

FDCPA has assumed greater importance as the primary means to hold part-time debt buyers accountable for their abusive debt collection practices. If the phrase "owed or due another" is interpreted to refer to the time of collection, a key class of debt buyers will receive an immediate exemption from the FDCPA, frustrating Congress's goal of "eliminat[ing] abusive debt collection practices." 15 U.S.C. § 1692(e).

B. The Fourth Circuit's interpretation gives "principal purpose" debt buyers—who regularly engage in abusive practices—an incentive to evade the FDCPA through strategic diversification.

Beyond the immediate consequence of exempting a class of "regularly collects" debt buyers from the FDCPA's coverage, the Fourth Circuit's interpretation creates serious implications for "principal purpose" debt buyers as well. And even Respondents agree that "principal purpose" debt collectors merit FDCPA regulation. *See* Br. in Opp. 5.

The Fourth Circuit's reading would encourage entities whose "principal purpose" is to collect defaulted debt to restructure themselves, through strategic diversification and mergers, in order to escape FDCPA coverage. The possibility of allowing some of the most egregious FDCPA violators to insulate themselves from liability is troubling.

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global investment company. It bought over $4 billion of credit card debt in 2013 alone. *See* Nilson Report, *Top Buyers of Credit Card Debt 2013*, at 5 (May 2014), *available at* http://www.nilsonreport.com/upload/issues/1041_0002.pdf [http://perma.cc/7ZFG-KQ76].

Consider Ditech, formerly known as Green Tree, a mortgage servicer that paid $63 million to settle an enforcement action brought by the FTC and the CFPB. The agencies' complaint alleged an extensive list of FDCPA violations:

- Obscenities, yelling, and harassing and abusive language such as "get a real job" and "you should leave your husband if he can't provide for you";
- Repeated phone calls and voicemails—between seven and twenty per day for weeks—including early in the morning and late at night, at home and at work;
- Unlawful threats to have debtors arrested or imprisoned, or to garnish wages or foreclose on property;
- Unlawful disclosures of debts to employers, coworkers, neighbors, friends, and family, plus requests that these third parties assist the homeowner in making payments; and
- Unapproved debits from homeowners' bank accounts.

Compl. at 14-17, *Fed. Trade Comm'n v. Green Tree Servicing LLC*, No. 0:15-cv-02064 (D. Minn. Apr. 21, 2015)[10] [hereinafter *Green Tree* Compl.]. Green Tree accepted, and the district court adopted, a settlement for $63 million and injunctive relief. *See* Stipulated

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10 Available at https://www.ftc.gov/system/files/documents/cases/150421greentreecomplaint.pdf [https://perma.cc/3WMB-LGD7].

Order for Permanent Inj. and Monetary J., *Green Tree Servicing* (D. Minn. Apr. 23, 2015).[11]

About four months later, Green Tree shed its name, merging with Ditech Mortgage Corp. and adopting the name "ditech, a Walter company." HousingWire, *Green Tree Gone; Ditech Merger Complete* (Sept. 2, 2014).[12] Both companies were already owned by the same parent; the merger was seen as a strategic effort at rebranding, even by industry publications. *See id.* ("By divesting itself of the Green Tree name, Walter Investment leaves behind Green Tree's legacy, which included a $63 million fine * * * .").

"Principal purpose" debt collectors already use corporate restructuring to confuse consumers and to evade regulation and liability. And some entities have already begun restructuring specifically to evade the FDCPA. For example, in *Federal Trade Commission v. Check Investors, Inc.*, the defendant entity was created by a legally trained fraudster who "theorized that if a debt collection business collected only debts it actually owned based on purchasing NSF checks, it would not be subject to the FDCPA, and would therefore be free to use collection techniques prohibited by the FDCPA such as harassment and deception." 502 F.3d 159, 162-63 (3d Cir. 2007).

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[11] Available at http://www.ftc.gov/system/files/documents/cases/150421greentreestiporder.pdf [http://perma.cc/VDJ3-8TSV].

[12] Available at http://www.housingwire.com/articles/34970-green-tree-gone-ditech-merger-complete [http://perma.cc/T9P9-A57E].

Other companies would likely follow suit if this Court adopted the Fourth Circuit's interpretation. For instance, Walter Investment, Green Tree's parent, had maintained a debt collecting arm and a mortgage servicing arm; the Fourth Circuit's approach would allow the parent to immunize itself from liability merely by merging the two, as it did to drop the Green Tree name. If companies like Green Tree will effect a merger to rehabilitate their reputations, they would likely do so to escape FDCPA regulation altogether.

Similarly, other companies have made aggressive use of the corporate form to confuse consumers and escape liability. *See, e.g.*, Mem. in Support of Pl.'s *Ex Parte* Appl. for TRO, *Fed. Trade Comm'n v. Asset & Capital Mgmt. Grp.*, No. 13-cv-5267 (C.D. Cal. July 23, 2013)[13] (accusing a "principal purpose" debt buyer of spreading into a tentacular set of subsidiaries and using those subsidiaries to commit blatant FDCPA violations, including impersonating process servicers and impermissibly threatening to have consumers arrested); Press Release, Fed. Trade Comm'n, FTC Returns Almost $4 Million to Consumers in Debt Collection Scam (June 30, 2015).[14] This Court should not provide incentives, and Congress did not intend to provide incentives, for corporate restructuring that avoids the FDCPA.

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[13] Available at http://www.ftc.gov/sites/default/files/documents/cases/2013/08/130801acmgmemo.pdf [http://perma.cc/SU75-E7BE].

[14] Available at http://www.ftc.gov/news-events/press-releases/2015/06/ftc-returns-almost-4-million-consumers-debt-collection-scam [http://perma.cc/BSK4-FZD7].

If this Court affirms the Fourth Circuit's reading, then a "principal purpose" debt buyer could escape liability for misconduct related to its defaulted debt merely by merging with a non-debt-buying entity to form a larger entity whose "principal purpose" is not debt collection. Since the Fourth Circuit's reading excludes companies that "regularly collect[]" debt that they purchased after default—though not those whose "principal purpose" is collecting such debt—such mergers would evade the FDCPA.

If "principal purpose" debt collectors can so readily escape liability under the FDCPA, the statute will be undermined. For example, in an enforcement action against the nation's two largest debt buyers, who held the rights to collect more than $200 billion in defaulted consumer debt, the CFPB found a welter of violations that resulted in $61 million in refunds, $18 million in civil penalties, and injunctions against several unlawful practices, including the collection of $128 million of bad debt. The debt buyers' misconduct included, among other things, the following FDCPA violations:

- "[a]ttempts to collect on unsubstantiated or inaccurate debt";
- deceptive, robo-signed court filings;
- suits filed without any intention to prove the underlying debt, on the assumption that defendants would not appear in court to contest the debt;
- "thousands of letters offering a limited-time opportunity to 'settle' without revealing that the [statute of limitations had passed]"; and

- harassing phone calls, including "thousands of calls to consumers before 8 a.m. or after 9 p.m." and hundreds of incidents in which a consumer was called more than twenty times in two days.

Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action Against the Two Largest Debt Buyers for Using Deceptive Tactics to Collect Bad Debts (Sept. 9, 2015);[15] *see also Magee v. Portfolio Recovery Assocs., LLC*, No. 12-CV-1624, 2016 WL 2644763, at *4 (N.D. Ill. May 9, 2016), *reconsideration denied*, 2016 WL 4765682 (N.D. Ill. Sept. 13, 2016) (granting summary judgment for plaintiffs in an FDCPA class action against one of the same debt buyers and finding that debt buyer deceptively implied that debts were not time-barred and were still subject to credit reporting).

If "principal purpose" debt collectors can evade liability for such acts through merger or diversification, it will tear a wide hole in the fabric of the Act, one inconsistent with Congress's broad remedial intent. *See* S. Rep. No. 95-382, at 1 (1977) ("[The Act's] purpose is to protect consumers from a host of unfair, harassing, and deceptive debt collection practices * * * .").

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[15] Available at http://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-the-two-largest-debt-buyers-for-using-deceptive-tactics-to-collect-bad-debts [http://perma.cc/5UQZ-FTAZ].

C. The Fourth Circuit's interpretation also provides incentives to debt servicers to evade FDCPA coverage by purchasing the debt they service, as Santander did here.

In addition to giving "principal purpose" debt collectors incentives to restructure their business to escape FDCPA coverage, the Fourth Circuit's reading encourages debt *servicers* to evade FDCPA coverage by purchasing the delinquent debt they service.

All parties agree that the FDCPA covers debt servicers that acquire defaulted loans for servicing, but do not own the loans. *See Bridge v. Ocwen Fed. Bank, FSB*, 681 F.3d 355, 359 (6th Cir. 2012) ("a loan servicer * * * can either stand in the shoes of a creditor or become a debt collector, depending on whether the debt was assigned for servicing before the default or alleged default occurred"); *cf.* Br. in Opp. 29 ("For servicing companies, which occupy a gray area between creditors and debt collectors, the distinction turns on the default status of debt at the time of acquisition."). Though the same principle should logically extend to an entity that *purchases* a defaulted loan, the Fourth Circuit disagreed. Its conclusion is puzzling. Nothing relevant about Santander Consumer USA and Petitioners' relationship changed by dint of Santander being an owner of defaulted debt rather than a servicer of defaulted debt. If anything, Santander's incentive to engage in abusive debt collection practices may have increased after it purchased Petitioners' loan, since Santander could keep the profits of its debt collection and had no continuing relationship with Petitioners' original creditor.

The Fourth Circuit's reading of the Act thus sets a troubling precedent. Since servicing arrange-

ments can be structured as purchases, an entity would be allowed to use debt collection practices prohibited by the FDCPA—so long as the entity's "principal purpose" is not debt collection. Given the enforcement actions brought against loan servicers who acquired servicing rights to defaulted debt, it seems inconsistent with Congressional intent and with common sense that these same servicers could evade FDCPA coverage by purchasing their delinquent debt portfolio. *See, e.g.*, *Green Tree* Compl., *supra*, at 27-34 (finding that a loan servicer, in connection with loans acquired after default, engaged in abusive debt collection practices); Compl. at 9-11, *Fed. Trade Comm'n v. Fairbanks Capital Corp.*, No. 0:03-cv-12219 (D. Mass. Nov. 12, 2003) (same); Second Am. Compl. at 20-21, *Fed. Trade Comm'n v. Capital City Mortg. Corp.*, No. 1:98-cv-237 (D.D.C. Apr. 17, 2002) (same). Because these debt servicers could escape FDCPA coverage under the Fourth Circuit's reading by structuring transactions as purchases rather than servicing arrangements, the requirements of the FDCPA would become an optional regime for those who purchase and then "regularly collect[]" defaulted debt.

As illustrated by governmental and private enforcement of the FDCPA, the detrimental consequences of the Fourth Circuit's reading are alien to a statute designed "to *eliminate* abusive debt collection practices." 15 U.S.C. § 1692(e) (emphasis added).

II. The Federal Government Has Long Interpreted The FDCPA To Apply To Purchasers Of Defaulted Debt.

The two agencies charged with general administration and enforcement of the FDCPA have uni-

formly interpreted 15 U.S.C. § 1692a(6) to include debt collectors that purchased debt in default. When statutory language is ambiguous, as here, *see* Pet'rs' Br. 19, 28-29, the interpretive decisions of agencies responsible for administering a statutory scheme properly "influence courts facing questions the agencies have already answered." *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001). The FTC and the CFPB possess authority to administer and enforce the FDCPA's protections: the agencies share general enforcement responsibilities, *see* 15 U.S.C. § 1692*l*(a), (b)(6), while the CFPB is also authorized to engage in rulemaking, *see id.* § 1692*l*(d). Annual agency reports to Congress "concerning the administration" of the FDCPA are also required. *Id.* § 1692m(a). The FTC and the CFPB's consistent, reasoned application of the FDCPA provides their interpretations "considerable" weight. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

The FTC and the CFPB's interpretations are thoroughly considered, well-reasoned, and consistent—and therefore persuasive under *Skidmore*'s multifactor test. *See Mead Corp.*, 533 U.S. at 228-29. Accordingly, courts have regularly afforded substantial deference to the agencies' interpretations of the Act. *See, e.g., Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 398 (6th Cir. 2015); *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1015, 1020 (7th Cir. 2014); *Ocwen*, 681 F.3d at 361; *see also Fed. Trade Comm'n v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) (noting that the FTC, "as an administrative agency which deals continually with cases in this area, * * * is often in a better position than are courts" to construe the statutes it enforces). Regardless of whether agency interpretations are the product of rulemaking, the degree of deference under *Skidmore*

turns on "[1] the thoroughness evident in [the agency's] consideration, [2] the validity of its reasoning, [3] its consistency with earlier and later pronouncements, and [4] all those factors that give it the power to persuade." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2169 (2012) (quoting *Skidmore*, 323 U.S. at 140) (internal quotation marks omitted). Moreover, the factors can be mutually reinforcing—for example, a consistent interpretation is more likely to reflect thorough consideration. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 15-16 (2011). Together, the four *Skidmore* factors recommend placing significant weight on the agencies' interpretations of Section 1692a.

The expertise and deliberation that support application of *Skidmore* deference to the agencies' consistent position also approach the showing necessary to apply the level of deference formulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). This Court has held a "long standing" interpretation reached "through means less formal than 'notice and comment' rulemaking" can support *Chevron* deference. *Barnhart v. Walton*, 535 U.S. 212, 221 (2002); *see also NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 259 (1995) (applying *Chevron* deference to a series of letters issued by the Comptroller of the Currency). Rather than the formality of the agency's process, *Chevron*'s applicability depends on "the interstitial nature of the legal question, the related expertise of the [a]gency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the [a]gency has given the question over a long period of time." *Barnhart*, 535 U.S. at 222. Here, the agencies' interpretation, reit-

erated over almost thirty years in guidance, study, preliminary rulemaking, and enforcement, supports potential application of *Chevron*—and at the least particularly strong deference under *Skidmore*.

1. The FTC and the CFPB's understanding that purchasers of defaulted debt are debt collectors reflects thorough consideration; the significant depth and breadth of the agencies' assessment counsel giving their interpretation considerable weight. *See Mead Corp.*, 533 U.S. at 228. "[C]areful consideration" may be inferred from "the length of time the agencies" have maintained their views. *Kasten*, 563 U.S. at 15-16. The FTC established its interpretation through guidance documents and multiyear study, while the CFPB has proceeded through official reports and a rule that interprets language identical to the statute. Both agencies have engaged in thorough consideration of statutory structure, industry practice, and judicial precedent.

The FTC's interpretation that Section 1692a(6) covers entities that "regularly collect[]" debt purchased in default dates back to a Staff Opinion Letter issued in 1988. *See* Fed. Trade Comm'n, Staff Opinion Letter, Fair Debt Collection Practices Act (Nov. 22, 1988), 1988 WL 1098780 [hereinafter FTC Staff Opinion Letter]. In this Letter, the FTC responded to an inquiry about whether "a check guarantee service * * * would be considered a debt collector under the Act in a situation where it purchases consumers' dishonored or NSF checks from merchants [for collection]." *Id.* at *1. The FTC replied that, yes, the FDCPA "applies to a corporation collecting its own debts if that corporation regularly collects debts * * * that were 'already in default when they were assigned to the corporation.'" *Id.* at *2

(quoting *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1486 (M.D. Ala. 1987)). The FTC adopted *Kimber*'s interpretation that subsections 1692a(4) and (6) interact to exclude from the FDCPA's scope only those who collect debts that originally belonged to themselves. *Id.* at *1 (citing *Kimber*, 668 F. Supp. at 1485). The FTC has maintained this understanding in more recent agency guidance. *See, e.g.*, Christopher Koegel, Assistant Dir. of Div. of Fin. Practices, Fed. Trade Comm'n, *Think Your Company's Not Covered by the FDCPA? You May Want To Think Again* (Dec. 8, 2015).[16]

The FTC has also reiterated this understanding of Section 1692a(6) through consistent enforcement of the FDCPA and study of the debt collection industry. The Commission issued a report on recent changes in the industry after a two-day workshop in October 2007 that "solicited public comments on a number of topics" related to debt collection. Fed. Trade Comm'n, *Collecting Consumer Debts: The Challenges of Change* 1, 5, 13 (Feb. 2009)[17] (finding that debt buyers' explosive growth represents "[t]he most significant change in the debt industry in recent years") [hereinafter *FTC 2009 Study*]. The FTC has continued to examine its regulation of the debt buying industry, issuing subsequent reports after public roundtables in 2009 and a later intensive

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[16] Available at http://www.ftc.gov/news-events/blogs/business-blog/2015/12/think-your-companys-not-covered-fdcpa-you-may-want-think [http://perma.cc/8UBQ-VPYU].

[17] Available at http://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf [http://perma.cc/Lf7F-2P3G].

study of industry data. *See* Fed. Trade Comm'n, *The Structure and Practices of the Debt Buying Industry* 1-2 (Jan. 2013)[18] (examining "a massive amount of information related to debt buying") [hereinafter *FTC 2013 Study*]; Fed. Trade Comm'n, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* 1 (July 2010) [hereinafter *FTC 2010 Study*].[19]

The public participation in two of these reports increases their resemblance to "notice-and-comment rulemaking," the paradigmatic recipient of judicial deference. *See Mead Corp.*, 533 U.S. at 230. In the two later reports, the FTC reaffirmed its understanding that "debt buyers that seek to recover on debts that were in default when the debt buyers acquired them are debt collectors for purposes of the FDCPA." *FTC 2013 Study*, *supra*, at 3-4; *accord FTC 2010 Study*, *supra*, at 6 n.15. These reports, produced in light of extensive enforcement experience and in response to public comment and industry data, establish the Commission's considered opinion that the FDCPA covers entities like Santander Consumer USA.

The CFPB reached the same conclusion about this language's meaning during rulemaking. *See*

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[18] Available at http://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf [http://perma.cc/S6KQ-D5GF].

[19] Available at https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf [http://perma.cc/X5LY-J9TA].

Mead Corp., 533 U.S. at 230 (explaining that "notice-and-comment rulemaking" is more likely to yield interpretations reflecting "fairness and deliberation"). Although the CFPB has not directly interpreted Section 1692a by final rule,[20] the Bureau codified a definition of "debt collector" that verbatim copies the portions of Section 1692a(6) relevant to this case. *Compare* 12 C.F.R. § 1090.105, *with* 15 U.S.C. § 1692a(6).

The CFPB interpreted 12 C.F.R. § 1090.105 to "generally include[] third-party debt collectors, debt buyers, and collection attorneys." Defining Larger Participants of the Consumer Debt Collection Market, 77 Fed. Reg. 65,775, 65,778 (Oct. 31, 2012) [hereinafter CFPB Final Rule]. As Congress did in drafting the FDCPA, the CFPB reached this conclusion by citing differences between the credit and defaulted-debt markets to distinguish debt buyers from originating creditors. *Compare id.* at 65,783 ("By contrast [with creditors], neither third-party debt collectors nor debt buyers have originated the debts they collect or have ongoing business relationships with the consumers from whom they collect debts."), *with* S.

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[20] The CFPB has interpreted the FDCPA in proposed rulemaking to cover entities that "regularly collect[]" debt purchased in default. *See* Debt Collection (Regulation F): Advanced Notice of Proposed Rulemaking, 78 Fed. Reg. 67,848, 67,851 (proposed Nov. 12, 2013); Consumer Fin. Prot. Bureau, *Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered* 1 (July 28, 2016), *available at* http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf [http://perma.cc/968E-7NGQ].

Rep. 95-382, at 2 (1977) ("Unlike creditors, who generally are constrained by the desire to protect their goodwill when collecting past due accounts, independent collectors are likely to have no future contact with the consumer * * * ."). The CFPB's reasoned interpretation of its definition of "debt collector"—using the FDCPA's exact language—further supports Petitioners' position.

The FTC and the CFPB have reached and maintained their interpretation of "debt collector" by varying routes, each of which involved intensive consideration of the FDCPA. The FTC developed its interpretation over decades of enforcement actions and judicial decisions, as well as studies employing an analog of the notice-and-comment process. The CFPB's interpretation has reiterated the FTC's longstanding understanding in rulemaking proceedings. Together, the FTC and the CFPB's interpretation is informed by active engagement in enforcement actions, research and investigation, and collection of public input. These processes reflect the thorough consideration deserving of significant deference under *Skidmore*. *See Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (noting general judicial deference to agencies' accumulated "body of experience and informed judgment") (quoting *Skidmore*, 323 U.S. at 139-40).

2. The FTC and the CFPB's construction reflects "valid reasoning" because it comports with the FDCPA's structure and purpose. *See Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 38, 40-41 (1981) (assessing the agency's "validity of reasoning" based on the interpretation's "logical consistency" and alignment with the act's "discernible purpose" and "general scheme"). The

FTC's understanding borrows from judicial reasoning that the FDCPA covers acquirers of defaulted debt. *See FTC 2013 Study*, *supra*, at 3-4 & n.13 (recounting the textual, structural, and purposive analysis employed in the "seminal decision" of *Kimber*, 668 F. Supp. at 1486); *see also* Amicus Brief of the Fed. Trade Comm'n Supporting Rehearing En Banc at 6, *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309 (11th Cir. 2015), 2015 WL 5608572 (noting that "[a]ll courts of appeal that have previously addressed this question" have concurred with the FTC's interpretation) [hereinafter FTC Amicus Brief].

The CFPB's interpretation similarly accords with decisions distinguishing debt collectors from creditors based on whether the debt was in default when purchased. *Compare* CFPB Final Rule, *supra*, at 65,783 (reasoning that debt buyers' relationship with defaulted consumers is identical to that of third-party debt collectors), *with Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 538 (7th Cir. 2003) (noting that the FDCPA's distinction between debt collectors and creditors turns on "whether the activity directed at the consumer will be servicing or collection"). The agencies' interpretations of Section 1692a thus build on their administrative and enforcement decisions as well as decades of FDCPA litigation.

The agencies' reasoning is further supported by the FTC's recent "massive" study of debt buying. *FTC 2013 Study*, *supra*, at 2. Three key findings in that study reinforce the FTC's (and the CFPB's) conclusion that the FDCPA covers entities that "regularly collect[]" debt purchased in default.

First, the FTC found that debt buying has increased in recent years as a result of changing indus-

try pressures. For example, federal banking regulations have encouraged the sale of defaulted debt by requiring that depository institutions "charge off," or write down, debt after a certain period of nonpayment. *See FTC 2013 Study*, *supra*, at 13 & n.58 (citing Uniform Retail Credit Classification and Account Management Policy, 65 Fed. Reg. 36,903 (June 12, 2000)). These regulatory requirements have given incentives to originating creditors to sell debt that they might have previously left with servicers or third-party collectors in order to recover at least some economic return before the "charge-off" deadline. *Id.* This result enhances debt buyers' prevalence within the industry regulated by the FDCPA.

Second, the FTC found that, to protect their reputations, creditors may hire third-party debt collectors rather than sell defaulted debt because they will have "greater control over how debt collectors interact with consumers." *Id.* at 12. Accordingly, debt buyers are less likely than contracted collectors to be constrained by the original creditors' reputational concerns.

Third, debt buyers may be the entities most likely to engage in the collection practices proscribed by the FDCPA. The time lags and informational gaps created by multiple rounds of debt buying exacerbate the abusive behaviors that the Act was designed to prevent. *Id.* at 29-30, 45-46. For example, the FTC found that 30% of resold defaulted debt was older than six years when most states' applicable statutes of limitations "are between three and six years." *Id.* at 42-43. Also, "debt sellers typically do not provide dispute history information to buyers at the time of sale." *Id.* at 37. These practices lead to harassment of persons who have no legal obligation to pay.

The FTC's findings provide ample support for its interpretation that the FDCPA covers part-time debt buyers. The CFPB has raised similar concerns about the integrity of debt buyers' consumer information and collection efforts in its reports to Congress. *See, e.g.*, *CFPB 2016 Report*, *supra*, at 10-11. The agencies' reasoned and coherent interpretation of Section 1692a, in light of industry information, public input, and enforcement actions, recommends deference to this reading.

3. The agencies' understanding of the FDCPA's scope has remained unchanged. Agency views are more persuasive under *Skidmore* when they have been consistently asserted over time. *See Kasten*, 563 U.S. at 15-16; *Barnhart*, 535 U.S. at 221-22. A "consistent" interpretation may cover a period as short as five years. *See Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 399 (2008). The combined consistency of the FTC and CFPB's interpretation, dating back far more than five years, enhances the weight afforded their position.

As previously noted, the FTC has maintained its broad interpretation of Section 1692a(6) in a variety of public agency actions dating back at least to 1988. *See* FTC Staff Opinion Letter, *supra*. The FTC's unbroken chain of agency guidance has been accompanied by numerous enforcement actions predicated on the FTC's interpretive position. *See* FTC Amicus Brief, *supra*, at 14 & n.4 (collecting four enforcement actions against "loan purchasers" initiated between 1998 and 2015); *FTC 2013 Study*, *supra*, at 10 n.45 (collecting five actions against debt buyers brought between 2004 and 2012). The FTC has continued to rely on this reading to enforce the FDCPA against debt buyers that engage in abusive collection

practices. The Commission recently argued that the reading of Section 1692a in *Davidson*—on which the Fourth Circuit relied, *see* Pet App. 11a, 18a—would frustrate future enforcement efforts. FTC Amicus Brief, *supra*, at 14 (predicting that *Davidson*'s interpretation would disallow large-scale enforcement actions against abusive debt buyers and provide these entities a simple "roadmap for avoiding the strictures of the FDCPA"). Upending the FTC's nearly thirty-year understanding of the FDCPA would reshape and limit future enforcement efforts and disregard the agency's accumulated experience and expertise.

Although the CFPB only commenced operation in July 2011, it has maintained the same interpretation of Section 1692a that was included in its first annual report to Congress. *See* Consumer Fin. Prot. Bureau, *Fair Debt Collection Practice Act: CFPB Annual Report 2012*, at 7 n.11 (Mar. 2012)[21] ("'Third-party debt collectors' include contingency fee collectors and attorneys who regularly collect or attempt to collect, directly or indirectly, debts asserted to be owed or due another, as well as debt buyers collecting on debts they purchased in default."). The consistency of the FTC and now the CFPB's interpretations is critical to their successful protection of consumers' rights even as the debt collection industry has undergone transformative change since 1977.

Additionally, Congress's failure to revise Section 1692a(6) despite revisiting the FDCPA after the FTC established its interpretation in 1988 buttresses

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[21] Available at http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf [http://perma.cc/LLK7-2G9G].

the agency's consistent position. *See Barnhart*, 535 U.S. at 220 (noting that congressional amendments failing to change relevant statutory language "provide further evidence * * * that Congress * * * intended the agency's interpretation, or at least understood the interpretation as statutorily permissible"). In enacting the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), Congress deliberately expanded federal enforcement of the FDCPA's protections. *See id.* § 1089, 124 Stat. at 2092-93 (codified at 15 U.S.C. § 1692*l*); *see also* S. Rep. No. 111-176, at 19-20 (2010) (discussing, in a report accompanying draft FDCPA amendments that were subsequently enacted, the FTC's examination and policing of abusive debt collection practices as reported in the *FTC 2009 Study*, *supra*).

Moreover, Congress was advised during consideration of the Dodd-Frank Act that the FDCPA already covered debt buyers. *See* U.S. Gov't Accountability Off., GAO-09-748, *Credit Cards: Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Market and Use of Technology* 8 (Sept. 2009) [hereinafter GAO 09-748 Report]. Congress's retention of Section 1692a during the Dodd-Frank Act's sweeping overhaul of federal consumer protection laws, *see* S. Rep. No. 111-176, at 23 (noting "the urgent need for better consumer protections" and recognizing that "the federal government has not done enough to address these issues"), provides further support that the FTC's consistent position is "statutorily permissible" and deserving of deference.

4. Finally, the FTC and the CFPB's authority and expertise are important components in assessing

their interpretation's "power to persuade." *Mead Corp.*, 533 U.S. at 228-29 (quoting *Skidmore*, 323 U.S. at 140). The FTC and the CFPB possess "relative expertness" about the structure of the debt collection industry. *Id.* at 230. The FDCPA, as revised by the Dodd-Frank Act, contemplates that agencies will collaboratively exercise their joint expertise in crafting policy. *See* 15 U.S.C. § 1692m(b). This centralized, deliberative, and collaborative administration of the FDCPA is a far cry from 10,000 customs classifications "churned out" by "46 scattered offices." *Mead Corp.*, 533 U.S. at 233. Here, by contrast, the FTC's longstanding experience enforcing the Act and the CFPB's overarching authority to regulate "consumer financial products and services," 12 U.S.C. § 5491(a), including under the FDCPA, *see* 15 U.S.C. § 1692*l*(d), provide these agencies' broad authority over the debt collection industry.

In addition to enforcement, data collection, rulemaking, and guidance, these agencies regularly collect, review, and respond to thousands of consumer complaints regarding the debt collection industry. *See FTC 2013 Study*, *supra*, at 50 (reporting that the FTC "has continued to receive a high level of complaints regarding debt collectors, more than for any other industry"); *accord CFPB 2016 Report*, *supra*, at 18. The agencies' "expertness," honed over decades of policing the FDCPA's consumer protections and monitoring the quickly changing and diverse debt collection industry, is deserving of deference.

Although the FTC and the CFPB are the most authoritative interpreters of the FDCPA in the executive branch, other governmental agencies have adopted the same conception of the FDCPA's coverage. *See* Off. of the Comptroller of the Currency,

OCC Bull. 2014-37, *Consumer Debt Sales: Risk Management Guidance* (Aug. 4, 2014)[22] ("Under the FDCPA, 'debt collector' is defined broadly to generally encompass debt buyers working on behalf of original creditors, including banks."); GAO-09-748 Report, *supra*, at 8. Additionally, a leading trade association for debt buyers has adopted the same reading of Section 1692a(6) as the FTC and the CFPB. *See* David Reid, Dir. of Gov't Affairs & Policy, Debt Buyers' Ass'n Int'l, *The Debt Buying Industry* 4 (Apr. 2015)[23] ("[I]f a debt buyer purchases nonperforming consumer accounts, the FDCPA would apply."). The expertise and experience that have led other agencies and industry groups to follow the CFPB and the FTC's reasoning recommend placing significant weight on the agencies' interpretation.

* * *

The Fourth Circuit's interpretation of Section 1692a exempts from the FDCPA's longstanding regulation debt buying entities that acquire and collect billions of dollars of defaulted debt every year. The Fourth Circuit's problematic distinction between "principal purpose" and "regularly collects" debt buyers provides an unintended windfall for sophisticated debt collectors at American consumers' expense. Instead, consistent with the Act's purpose and the interpretation that the FTC and the CFPB have main-

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[22] Available at http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-37.html [http://perma.cc/K35S-5MNN].

[23] Available at http://www.dbainternational.org/wp-content/uploads/DBA_White_Paper_The_Debt_Buying_Industry.pdf [http://perma.cc/CH6T-HHL2].

tained across decades of agency action, the FDCPA should be applied broadly to prevent abusive conduct by debt collectors that regularly acquire defaulted debt.

CONCLUSION

The judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted.

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RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

RICKY HENSON, ET AL.,

Petitioners,

v.

SANTANDER CONSUMER USA, INC.,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE NATIONAL CONSUMER LAW CENTER, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, TZEDEK DC, THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA, AND CIVIL JUSTICE IN SUPPORT OF PETITIONERS

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Boston Ins. Co. v. Gable,
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Bridge v. Ocwen Fed. Bank,
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Caprio v. Healthcare Revenue Recovery Grp., L.L.C., 709 F.3d 142 (3d Cir. 2013) 16

Christensen v. Harris Cnty.,
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Cirkot v. Diversified Fin. Sys., Inc.,
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Cobb v. Contract Transp., Inc.,
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Davidson v. Capital One Bank,
797 F.3d 1309 (11th Cir. 2015) 23

Fed. Trade Comm'n v. Check Investors, Inc.,
502 F.3d 159 (3d Cir. 2007) ..... *passim*

Fort Stewart Schools v. Fed. Labor Relations Authority, 495 U.S. 641 (1990) 8

Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertollotti, 374 F.3d 56 (2d Cir. 2004) 3

Gonzales v. Arrow Fin. Services, L.L.C., 660 F.3d 1055 (9th Cir. 2011) 30

Hamilton v. United Healthcare of La., 310 F.3d 385 (5th Cir. 2002) 6

Hibbs v. Winn, 542 U.S. 88 (2004) 8

Holmes v. Telecredit Serv. Corp., 736 F. Supp. 1289 (D. Del. 1990) 15-16

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, 559 U.S. 573 (2010) 1

Johnson v. Riddle, 305 F.3d 1107 (10th Cir. 2002) 16

Kimber v. Federal Fin. Corp., 668 F. Supp. 1480 (M.D. Ala. 1987) ..... *passim*

Lefrak Organization, Inc. v. Chubb Custom Ins. Co., 942 F. Supp. 949 (S.D.N.Y. 1996) 7

McKinney v. Cadleway Properties, Inc., 548 F.3d 496 (7th Cir. 2008) 10, 12-14

Miller v. BAC Home Loans Servicing, L.P.,
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Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.,
470 U.S. 451 (1985) 6-7

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007) 8

Olsen v. Lake Country, Inc.,
955 F.2d 203 (4th Cir. 1991) 17

Perry v. Stewart Title Co.,
756 F.2d 1197 (5th Cir. 1985) 9, 21

Robinson v. Shell Oil Co.,
519 U.S. 337 (1997) 15

Romine v. Diversified Collection Servs., Inc.,
155 F.3d 1142 (9th Cir. 1998) 24

Schlosser v. Fairbanks Capital Corp.,
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Skidmore v. Swift & Co.,
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Suesz v. Med-1 Solutions, L.L.C.,
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United States v. Mead Corp.,
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Wadlington v. Credit Acceptance Corp.,
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STATUTES:

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REGULATIONS:

Statements of General Policy or Interpretation
Staff Commentary on the Fair Debt
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50,097-02 (1988) 25

Consumer Fin. Prot. Bureau, Advanced Notice
of Proposed Rulemaking of November
12, 2013, Debt Collection (Regulation
F), 78 Fed. Reg. 67,848-01 26

LEGISLATIVE HISTORY:

H.R. 5294, 95th Cong. (1977) 17

Senate Comm. on Banking, Housing & Urban
Affairs, Markup Session: S. 1130 Debt
Collection Legislation
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S. Rep. No. 95-382, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1695 ..... 8, 17, 20

Pub. L. No. 101-73, Title VII, § 744(n), 103 Stat. 440 (1989) 28

Pub. L. No. 102-242, Title II, § 212(e), 105 Stat. 2301 (1991) 28

Pub. L. No. 102-550, Title XVI, § 1604(a)(8), 106 Stat. 4082 (1992) 28

Pub. L. No. 104-88, Title III, § 316, 109 Stat. 949 (1995) 28

Pub. L. No. 104-208, Title II, §2305(a), 110 Stat. 3009-425 (1996) 28

Pub. L. No. 109-351, Title VIII, § 802, 120 Stat. 2006 (2006) 28

Pub. L. No. 111-203, Title X, §1089(2), 124 Stat. 2092 (2010) 28

Pub. L. No. 111-203, § 1089(3) (2010) 26

Pub. L. No. 111-203, § 1089(4) (2010) 26

ADMINISTRATIVE REPORTS:

Consumer Fin. Prot. Bureau, 2013 Fair Debt Collection Practices Annual Report 4 n.14 (2013) 28, 31

Consumer Fin. Prot. Bureau, 2016 Fair Debt Collection Practices Act Annual Report 3 (2016) 6

Consumer Fin. Prot. Bureau, Collector and Debt Buyer Rulemaking, Outline of Proposals under Consideration and Alternatives Considered (2016) 26

Consumer Fin. Prot. Bureau, Market Snapshot: Online Debt Sales (2017) 30

Fed. Trade. Comm'n, Collecting Consumer Debts: The Challenges of Change 5 (2009), *available at* www.ftc.gov/bcp/workshops /debtcollection/dcwr.pdf 27

Fed. Trade Comm'n, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration 6 n.15 (2010), *available at* www.ftc.gov/os/2010/07/debt collectionreport.pdf 27

Fed. Trade Comm'n, The Structure and Practices of the Debt Buying Industry 12 (2013) *available at* www.ftc.gov/os/2013/01/debtbuying report.pdf 27, 29, 31

Fed. Trade Comm'n, Informal Staff Opinion Letter, 1993 WL 13148377 (F.T.C.) 24

OTHER AUTHORITIES:

Letter from Clarke W. Brinckerhoff to Kimberlee Arbuckle (Dec. 22, 1993)..... 24

Press Release, Fed. Trade Comm'n, Debt Buyer/Debt Collection Companies and Their Principals Settle FTC Charges (Mar. 24, 2004), *available at* https://www.ftc.gov/news-events/press-releases/2004/03/debt-buyerdebt-collection-companies-and-their-principals-settle 31-32

Press Release, Fed. Trade Comm'n, Debt Collector Settles with FTC for Abusive Practices (Mar. 12, 2007), *available at* https://www.ftc.gov/news-events/press-releases/2007/03/debt-collector-settles-ftc-abusive-practices 32

Robert M. Hunt, Presentation at the Consumer Fin. Prot. Bureau & Fed. Trade Comm'n Joint Roundtable Discussion: Life of a Debt: Data Integrity in Debt Collection, "Understanding the Model: The Life Cycle of a Debt" (June 6, 2013)..... 29

Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom—In Lawsuits*, WALL ST. J., Nov. 29, 2010, at A1, *available at* http://online.wsj.com/article/SB10001424052702304510704575562212919179410.html..... 30

Merriam-Webster.com, http://www.merriam-webster.com/dictionary/for (last visited May 7, 2015) 15

Nat'l Consumer Law Center, Collection Actions (3d ed. 2014) 1

Nat'l Consumer Law Center, Fair Debt Collection (8th ed. 2014) 1

INTEREST OF AMICI[1]

National Consumer Law Center ("NCLC") is a national research and advocacy organization focusing on the legal needs of consumers, especially low income and elderly consumers. The Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* (the "FDCPA") has been a major focus of the work of NCLC. NCLC publishes *Fair Debt Collection* (8th ed. 2014), and *Collection Actions* (3d ed. 2014), comprehensive treatises to assist attorneys and debt collectors to comply with the law. This Court has relied upon *Fair Debt Collection* as supporting authority. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich,* 559 U.S. 573, 591 n.12 (2010).

National Association of Consumer Advocates ("NACA") is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, and law professors and students whose primary practice or area of study involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members and consumers in the ongoing struggle to curb unfair and oppressive business practices. Compliance with the FDCPA and faithful application of this law as Congress wrote it have been a continuing focus of NACA since its inception.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amici curiae or their counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for both parties are on file with the Clerk.

Tzedek DC is an independent public interest legal aid center at the University of the District of Columbia David A. Clarke School of Law. Tzedek DC's mission is to safeguard the legal rights of low-income District of Columbia residents facing debt collection lawsuits and other consumer protection crises.

The Legal Aid Society of the District of Columbia (Legal Aid) was formed in 1932 to provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs. Today, Legal Aid is the oldest and largest general civil legal services provider in the District of Columbia. Legal Aid advocates on behalf of its clients to preserve affordable housing, ensure access to critical safety net benefits, protect consumer rights, and keep families safe and stable. As part of its consumer law practice, Legal Aid represents consumers in debt collection matters filed in District of Columbia courts, including many cases involving debt buyers. Through this on-the-ground work, Legal Aid attorneys regularly encounter consumers who have been subjected to a variety of abusive debt collection tactics, including unfair practices covered by the FDCPA.

Civil Justice is a non-profit public interest legal association founded in 1998 for the purpose of increasing the delivery of legal services to clients of low and moderate income while supporting a statewide network of solo, small-firm and community-based lawyers who share a commitment to increasing access to justice. Civil Justice and members of its attorney network regularly advise and represent consumers regarding debt buyers.

Having witnessed the abuses of unethical debt buyers, Civil Justice and its members are committed to maintaining the protections of the FDCPA for consumers against debt buyers.

SUMMARY OF ARGUMENT

The Fourth Circuit held that Respondent Santander Consumer USA Inc. ("Santander") was not subject to the FDCPA even though it regularly purchases consumer debt that is already in default and regularly attempts to collect on it. The ruling contravenes and now threatens to disrupt decades of interpretation of the FDCPA by regulatory authorities and courts which have held that a buyer of debt that is in default is a "debt collector" bound to comply with the prophylactic provisions of the FDCPA.

The Court of Appeals' ruling allowed Santander to escape the FDCPA by its narrow reading of the statutory definitional language "for another." The FDCPA defines "creditors" and "debt collectors." A "creditor" is "any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. § 1692a(4). A "debt collector" is one "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). "Regularly" includes modest but integral collection activities. *Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertollotti*, 374 F.3d 56 (2d Cir. 2004). A debt collector must be collecting a debt that was "in

default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii).

Santander was collecting the defaulted consumer accounts "for another" as assignee of the originating creditor. That is, Santander collected debt in the place of (for), or in lieu of (for), the originating creditor. This statutory language is entirely consistent with the long-established understanding that purchasers of defaulted debt must comply with the FDCPA, as any other covered "debt collector."

Santander was collecting a debt that it acquired after the consumer defaulted. Santander did not originate that debt. Santander was collecting for (in the shoes of) the originating creditor. Therefore, Santander is not an exempt creditor and must comply with the FDCPA.

The ruling below that a bad-debt purchaser is not subject to the FDCPA because the debt buyer is not seeking to collect "for another" (1) runs afoul of the principles of statutory construction; (2) is inconsistent with congressional intent and legislative history of the FDCPA; (3) is contrary to decades of guidance and enforcement actions by the federal agency responsible for enforcing the FDCPA; and (4) would exempt the entire debt buying industry and grant debt buyers a significant competitive advantage over other debt collectors whose collection efforts must comply with the FDCPA, which would "elevate form over substance and weave a technical loophole into the fabric of the FDCPA big enough to devour all of the protections Congress intended in enacting that legislation." *Fed. Trade Comm'n v. Check Investors, Inc.*, 502 F.3d

159, 172–73 (3d Cir. 2007). A massive industry now exists of companies that have purchased hundreds of billions of dollars of defaulted consumer debt. As explained in detail below, the debt buying industry, which developed after the passage of the FDCPA, embodies the exact type of entity that Congress was attempting to regulate through the statute.

THE FAIR DEBT COLLECTION PRACTICES ACT

Congress passed the FDCPA in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices." 15 U.S.C. § 1692(a). These abusive debt collection practices, Congress observed in its findings, "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a). Determining that existing laws were inadequate to address the problem, § 1692(b), Congress acted in order to "eliminate abusive debt collection practices," as well as "insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e).

In keeping with the purposes expressed in § 1692, the FDCPA regulates debt collection practices by both imposing affirmative requirements on debt collectors and prohibiting a wide range of conduct, *see, e.g.*, § 1692e (prohibiting the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt"); § 1692f (prohibiting the use of "unfair or unconscionable means to collect or attempt to collect any debt"); § 1692b (setting out the rules a debt

collector must follow for "acquiring location information" about the debtor).

Through the FDCPA, Congress "legislatively expressed a strong public policy disfavoring dishonest, abusive, and unfair consumer debt collection practices, and clearly intended the FDCPA to have a broad remedial scope." *Hamilton v. United Healthcare of La.*, 310 F.3d 385, 392 (5th Cir. 2002).[2]

While the FDCPA has improved debt collection industry practices, bad actors in that industry still generate more complaints than any other. Consumer Fin. Prot. Bureau, 2016 Fair Debt Collection Practices Act Annual Report 3 (2016).

ARGUMENT

I. THE FDCPA APPLIES TO DEBT BUYERS WHO PURCHASE DEFAULTED CONSUMER DEBTS

A. The Relevant FDCPA Definitions Are Ambiguous

The Fourth Circuit's conclusion that the meaning of the FDCPA is "clear" and that exclusions and exceptions to statutory definitions have no bearing on what the statute covers is illogical.

The definition of "ambiguous" is that words are reasonably susceptible of different interpretations. *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451,

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[2] *See Cirkot v. Diversified Fin. Sys., Inc.*, 839 F. Supp. 941, 944-47 (D. Conn. 1993) ("The FDCPA is based on the premise '[t]hat every individual, whether or not he owes [a] debt, has a right to be treated in a reasonable and civil manner.'" (quoting 123 Cong. Rec. 10241 (1977) (remarks of Rep. Frank Annunzio)).

473 n. 27 (1985). That there is a difference of opinion among the Courts of Appeal as to the meaning of words used in the definition of "debt collector" suggests that the competing readings may be reasonable.[3] Indeed, courts have noted that the coverage provisions of the FDCPA are "far from a model of drafting clarity," *Kimber v. Federal Fin. Corp.*, 668 F. Supp. 1480, 1484 (MD. Ala. 1987), and "somewhat convoluted," *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 106 (6th Cir. 1996).[4] To simply pick one of the competing viewpoints and declare that it is "clearly" the right answer is not helpful.

The notion that exceptions or exclusions in a statutory definition must be ignored in determining

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[3] *Boston Ins. Co. v. Gable*, 352 F.2d 368, 370 (5th Cir. 1965) ("we agree with the trial court's further conclusion that since the interpretation of this contractual language has been differently construed by courts of different jurisdictions," it is ambiguous, and therefore should be construed against the insurance company); *Lefrak Organization, Inc. v. Chubb Custom Ins. Co.*, 942 F. Supp. 949, 957 (S.D.N.Y. 1996) ("the range and variety of judicial opinions" deriving different meanings from the same language in a form insurance policy supports the conclusion that it is ambiguous, i.e., can reasonably be interpreted to mean different things).

[4] Many of the FDCPA definitions employ repetition to secure inclusiveness of coverage, making it impossible to simply insert a definition each time the defined word appears and have the FDCPA make sense. For example, the definitions of "consumer" and "debt" in §§ 1692a(3) and (5) are repetitive: "consumer" means "any natural person obligated or allegedly obligated to pay any debt," and "debt" means "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment."

what is covered by the basic definition also has little to commend it. The fact that Congress found it necessary to except or exclude a subject certainly suggests that the subject would be covered by the basic statutory definition absent the exception or exclusion. *Fort Stewart Schools v. Fed. Labor Relations Authority,* 495 U.S. 641, 646 (1990) (Scalia, J.).

"[A] reviewing court should not confine itself to examining a particular statutory provision in isolation. Rather, [t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (internal quotation marks and citation omitted). A statute should be construed so that effect is given to all its provisions, and no part is made superfluous. *Hibbs v. Winn*, 542 U.S. 88 (2004). "The rule against superfluities complements the principle that courts are to interpret the words of a statute in context." *Hibbs*, 542 U.S. at 124.

B. The FDCPA Covers Debt Buyers

The FDCPA generally applies to "debt collectors." 15 U.S.C. § 1692k(a). With certain exceptions, the FDCPA covers the actions of debt collectors, rather than creditors, because Congress concluded that "[u]nlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." S. Rep. No. 95–382, 95th Cong., 1st Sess., reprinted in 1977 U.S. Code Cong. & Admin. News 1695, 1696.

The FDCPA defines a "debt collector" in part as:

> any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

15 U.S.C. § 1692a(6). Among other exclusions, the term does not apply to "any person collecting or attempting to collect any debt owed ... or due another to the extent such activity ... concerns a debt that was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii). "Creditor" is defined as "any person who offers or extends credit creating a debt or to whom a debt is owed," but excludes "any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. § 1692a(4) (the "Assignee Exception").

Several Circuits hold that the operative question for the purposes of determining whether an entity is a "creditor" or "debt collector" is the status of the debt at the time it was acquired. *Miller v. BAC Home Loans Servicing, L.P.*, 726 F.3d 717 (5th Cir. 2013); *Bridge v. Ocwen Fed. Bank*, 681 F.3d 355, 359 (6th Cir. 2012); *Fed. Trade Comm'n v. Check Investors, Inc.*, 502 F.3d 159, 173 (3d Cir. 2007); *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir. 2003); *Perry v. Stewart Title Co.*, 756 F.2d 1197 (5th Cir. 1985).

Put simply, "the Act treats assignees as debt collectors if the debt sought to be collected was in default when acquired by the assignee, and as creditors if it was not." *Schlosser,* 323 F.3d at 536; *accord Bridge*, 681 F.3d at 359; *McKinney v. Cadleway Properties, Inc.*, 548 F.3d 496 (7th Cir. 2008); *Check Investors*, 502 F.3d at 173.

In *McKinney v. Cadleway Properties*, 548 F.3d 496 (7th Cir. 2008), the Seventh Circuit explained that the Act draws the distinction "by the *exclusionary* language . . . in the statutory definitions of creditor and debt collector":

> That is, the definition of creditor excludes those who acquire and attempt to collect a "debt *in default,*" § 1692a(4) (emphasis added), while the definition of debt collector excludes those who acquire and attempt to collect "a debt which was *not in default* at the time it was obtained," §1692a(6)(F) (emphasis added). So one who acquires a "debt in default" is categorically *not* a creditor; one who acquires a "debt not in default" is categorically *not* a debt collector.

Id. at 501. In other words, the "second subcategory of debt collectors," *i.e.* those who regularly collect debts owed or due another, "refers back to a group specifically *excluded* from the Act's definition of creditors–those who receive "an assignment or transfer of a debt in default" for the purpose of "facilitating [the] collection of such debt for another." *Id.* at 500.

When read in isolation, the Assignee Exception appears nonsensical. "[A]n assignment is

generally defined as the 'transfer by a party of all of its rights to some kind of property, usually intangible[.]'" *Kimber*, 668 F. Supp. at 1485 (quoting Black's Law Dictionary, 5th Ed., p. 109). The notion of an assignee who acquires a debt after default but is not collecting for itself does not make sense. However, when read in context and with the directive to avoid rendering statutory language meaningless, the meaning becomes clear:

> To say that this exception applies only to those who collect debts for others would be to render the exception superfluous and meaningless; those who collect debts for others are not in the original definitional universe, and there is therefore no need to exclude them. Rather, the excluding factors in the exception are that the debts are the result of an assignment or transfer and that the debts were already in default at the time of assignment or transfer. With the phrase 'for another' at the end of the exception, Congress merely intended that the debts should have originally belonged to another and that the creditor was therefore in effect a third-party or independent creditor.

Kimber v. Federal Fin. Corp., 668 F. Supp. 1480, 1485 (MD. Ala. 1987).

The phrase "owed or due another" in the definition of "debt collector" in § 1692a(6) only makes sense if the phrase is interpreted to mean *originally* owed or due another. Judge Thompson explained:

> [T]he first part of § 1692a(4) defines the universe of creditors as those who collect debts for themselves. Section 1692a(6)(A) purports to exclude these creditors from the general definition of debt collector. There would be no need to exclude creditors—those who collect debts for themselves—from the general definition of debt collector unless that general definition included those who collect debts for themselves.

Id.

C. Coverage of Buyers of Defaulted Debt Is Consistent With the Purpose of the FDCPA

Once it is recognized that an ambiguity exists, consideration of the purpose of the FDCPA in resolving it is appropriate. *Suesz v. Med-1 Solutions, L.L.C.*, 757 F.3d 636, 646–49 (7th Cir. 2014) (en banc) (purposive construction of the FDCPA is appropriate).

The interpretation that purchasers of debts in default are covered is consistent with the manifest purpose of the FDCPA. As explained by the Seventh Circuit in *McKinney:*

> We have held that "[f]or purposes of applying the Act to a particular debt, these two categories-debt collectors and creditors-are mutually exclusive." *Schlosser,* 323 F.3d at 536. We have also observed, however, that "for debts that do not originate with the one attempting collection, but are acquired

from another, the collection activity related to that debt could logically fall into either category." *Id. Schlosser* noted that in such a case-one involving a debt originated by another and subsequently acquired by the entity attempting collection-"the Act uses the status of the debt at the time of the assignment" to distinguish between a debt collector and a creditor. *Id.*

The Act draws this distinction in a rather indirect way, however-by the exclusionary language, quoted above, in the statutory definitions of creditor and debt collector. That is, the definition of creditor excludes those who acquire and attempt to collect a "debt in default," § 1692a(4) (emphasis added), while the definition of debt collector excludes those who acquire and attempt to collect "a debt which was not in default at the time it was obtained," § 1692a(6)(F) (emphasis added). So one who acquires a "debt in default" is categorically not a creditor; one who acquires a "debt not in default" is categorically not a debt collector.

Thus, we held in *Schlosser* that the Act "treats assignees as debt collectors if the debt sought to be collected was in default when acquired by the assignee, and as creditors if it was not." 323 F.3d at 536; *see also Bailey v. Sec. Nat'l Servicing Corp.*, 154 F.3d 384, 387 (7th Cir. 1998) ("The plain language of

§ 1692a(6)(F) tells us that an individual is not a 'debt collector' subject to the Act if the debt he seeks to collect was not in default at the time he purchased (or otherwise obtained) it."). We explained that "[f]ocusing on the status of the obligation asserted by the assignee is reasonable in light of the conduct regulated by the statute," which generally covers debt collection, not debt servicing:

> For those who acquire debts originated by others, the distinction drawn by the statute-whether the loan was in default at the time of the assignment-makes sense as an indication of whether the activity directed at the consumer will be servicing or collection. If the loan is current when it is acquired, the relationship between the assignee and the debtor is, for purposes of regulating communications and collection practices, effectively the same as that between the originator and the debtor. If the loan is in default, no ongoing relationship is likely and the only activity will be collection. . . .

McKinney, 548 F.3d at 501, citing *Schlosser*, 323 F.3d at 538.

Accordingly, the purchaser of a debt in default is a debt collector for purposes of the FDCPA even though it owns the debt and is collecting for itself. *Id.* at 538–39; *see also Fed. Trade Comm'n v. Check Investors, Inc.*, 502 F.3d 159, 171–74 (3d Cir. 2007) (holding that an entity engaged in collection activity on a defaulted debt acquired from another is a "debt collector" under the FDCPA even though it "may actually be owed the debt").

Thus, these courts read the definition of "debt collector" in § 1692a(6) in conjunction with the definition of "creditor" in § 1692a(4) to find that a debt collector includes entities who regularly collect defaulted debts on behalf of their owner, as well as entities who acquire and collect defaulted debts for their own account. The word "for" can mean "in place of" and "with respect to" as well as "on behalf of." Merriam-Webster.com (May 7, 2015), http://www.merriam-webster.com/dictionary/for. Accordingly, a debt buyer is collecting "for" (in the shoes of) another—the originating creditor.

Santander attempts to focus on a clause in isolation and give it a meaning that is at odds with its context, as well as the purpose of the FDCPA. However, "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). "[O]ne cannot take a clause out of context and give it a meaning which is inconsistent with the overall purpose of the legislation. Rather, if the definitional section is ambiguous our effort should be to interpret it in a manner which preserves rather than destroys the legislative purpose." *Holmes v.*

Telecredit Serv. Corp., 736 F. Supp. 1289, 1292–93 (D. Del. 1990).

Thus, as the court in *Holmes* stated:

> By use of the language "owed or due another" Congress was attempting to exclude those entities that extend credit from the effects of the Act. Congress intended to protect borrowers from "third persons who regularly collect debts for others." [Defendant] is a third party collecting a debt originally owed to another. . . . It cannot escape the spirit of the Act by the technicality of purchasing the debt upon default so that title technically rests in itself.

736 F. Supp. at 1293 (internal citations omitted).

This reading also comports with the principle that exemptions to remedial statutes are to be narrowly construed. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (interpreting exceptions to the remedial FLSA narrowly); *Cobb v. Contract Transp., Inc.*, 452 F.3d 543, 559 (6th Cir. 2006) ("Following traditional canons of statutory interpretation, remedial statutes should be construed broadly to extend coverage and their exclusions or exceptions should be construed narrowly."); *Caprio v. Healthcare Revenue Recovery Grp., L.L.C.*, 709 F.3d 142, 148 (3d Cir. 2013) ("As remedial legislation, the FDCPA must be broadly construed in order to give full effect to these purposes"); *Johnson v. Riddle*, 305 F.3d 1107, 1117 (10th Cir. 2002) (explaining that because the FDCPA is a remedial statute, it is construed liberally in

favor of the consumer); *Olsen v. Lake Country, Inc.*, 955 F.2d 203, 206 (4th Cir. 1991) ("[E]xemptions from remedial statutes are to be construed narrowly"). Entities that purchase and collect defaulted consumer debts are clearly within the scope of what Congress intended to regulate when it enacted the statute. As explained below, this reading is made clearer by the legislative history. Accordingly, Santander is a debt collector under the FDCPA.

D. The Legislative History and Purpose of the FDCPA Compel the Conclusion That Purchasers of Defaulted Consumer Debts Are Debt Collectors under the FDCPA as to Such Debts

The holding of the appellate courts that have considered the issue is consistent with the legislative history of the FDCPA. In particular, a debate over a proposed amendment in the Senate committee that drafted the FDCPA clearly supports those holdings. Senate Comm. on Banking, Housing & Urban Affairs, Markup Session: S. 1130 Debt Collection Legislation 2–3 (June 30, 1977).

The FDCPA was drafted by the Senate Committee on Banking, Housing & Urban Affairs based on a combination of bills, but primarily H.R. 5294, 95th Cong. (1977). *See* S. Rep. No. 95–382, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1695, 1696. Before the Senate Committee's changes, H.R. 5294 contained a very simple definition of debt collector with exceptions only for governments and lawyers. The phrase "debt collector" meant "any person who engages in any business the principal purpose of which is the collection of any debt, or any

person who directly or indirectly collects or attempts to collect a debt owed or due or asserted to be owed or due another, and who uses any instrumentality of interstate commerce in connection with such collections." The exceptions, including the Assignee Exception, were added in by the Senate Committee.

After the Senate Committee made its changes, the Committee held two markup hearings on the bill. During the first mark-up hearing, Senator Schmitt proposed an amendment that would exempt banks and retail organizations engaged in debt collection through "reciprocal collection arrangements," which were common in the banking industry at the time. Senate Comm. on Banking, Housing & Urban Affairs, Markup Session: S. 1130 Debt Collection Legislation 16 (1977). In a reciprocal collection arrangement, a local bank agreed to collect defaulted debts of debtors who moved to the local bank's area for another bank that did not have a local presence, in exchange for reciprocal treatment for customers that moved to the other bank's territory. *Id.* at 18.

Mr. Lewis Taffer, the Committee counsel, explained why the proposed amendment was undesirable: "[T]he reason the Committee print specifically would cover reciprocal agreements is because the philosophy of this bill is to cover all situations in which third parties who have been unrelated to the original debt come on to the scene for the first time to collect a delinquent debt." *Id.* at 17-18.

Senator Riegle, the sponsor of the bill, added, "the concern about third parties, whether they be banks or anybody else that put themselves in business to collect debts where they were not a party

to the original transaction, their good will is not on the line, their customer relationship is not on the line." *Id.* at 23. He continued:

> When you are collecting a debt that you had no involvement in the origination of, you are taking it on as a third party, that you are expected to follow the same ethical practices that everybody else in this business follows because you are electing to become a third-party debt collector.

Id. at 24.

A particularly telling exchange then occurred. The chairman of the Committee observed that if banks were exempted, there would be "unfair competition" because small collectors would be regulated and banks would not. *Id.*, at 24-25. Senator Morgan, a proponent of the amendment, responded: "Mr. Chairman, I don't believe you can find a bank in America that wants to get into the debt collection business of the kind we are talking about. I don't know of any that collect any debts other than for themselves except a reciprocal situation." *Id.* at 25. Senator Riegle forcefully responded:

> All we do here are prohibit practices that ought to be prohibited. As you say, any self-respecting bank that wants to get into the debt collection business, collecting from people who are not their customers but somebody else's customers, if they want to take themselves into that business that is their decision. If they do, then they

> would fall within the scope of living within the same bounds of ethical practices that everybody else in the debt collection business is in.

Id.

The proposed amendment was defeated. *Id.* at 55. Indeed, the Committee Report specifically noted that "[t]he definition of [debt collector] would include 'reciprocal collections.'" S. Rep. No. 95–382, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1695, 1696.

As the debate over the proposed amendment illustrates, Congress aimed to prevent any party from "collect[ing] from people who are not their customers but somebody else's customers" without adhering to "the same bounds of ethical practices that everybody else in the debt collection business is in." Senate Comm. on Banking, Housing & Urban Affairs, Markup Session: S. 1130 Debt Collection Legislation 25 (1977). Congress intended the FDCPA to apply to parties who "were not a party to the original transaction" because "their good will is not on the line, their customer relationship is not on the line." *Id.* at 23. Although the FDCPA was passed before the rise of the debt buying industry that exists today, Congress did not intend to allow an entity such as a debt buyer to unfairly compete with other debt collectors by avoiding the ethical standards that were being established in the FDCPA. *See id.* at 25. Congress' intent was to "cover all situations in which third parties who have been unrelated to the original debt come on to the scene for the first time to collect a delinquent debt," thus

precisely including debt buyers such as Santander here. *Id.* at 17-18.

Courts agree that the legislative history of the FDCPA firmly reinforces this conclusion. In the words of *Kimber*: "With §§ 1692a(4) and 1692a(6)(A), Congress clearly sought to exclude creditors—that is, those who extend credit and collect their own debts—from the Act's coverage; such persons are, in the words of the Senate Report, 'restrained by the desire to protect their good will.'" 668 F. Supp. at 1486. On the other hand,

> [W]hen these so-called creditors are in effect merely in the business of collecting stale debts rather than extending credit, they are no longer true creditors but debt collectors who, in the words of the Senate Report, 'are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them'; they are simply independent collectors of past due debts and thus clearly fall within the group Congress intended the Act to cover.

Id. See also, e.g., Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1985) ("The legislative history of section 1692a(6) indicates conclusively that a debt collector does not include the consumer's creditors, a mortgage servicing company or an assignee of a debt, as long as the debt was not in default at the time it was assigned."); *Ademiluyi v. PennyMac Mortg. Inv. Trust Holdings I, L.L.C.,* 929 F. Supp. 2d 502, 525 (D. Md. 2013) (noting that the logic behind the Act's

legislative history "extends to the debt purchaser context").

Thus, the overwhelming weight of authority is consistent with the position that a bad debt buyer who acquires defaulted debt to collect for (in the place of) another falls within the definition of "debt collector" under the FDCPA.

E. The Federal Agencies Charged with Enforcing the FDCPA Have Consistently Agreed That Purchasers of Defaulted Consumer Debts Are Subject to the FDCPA

The Federal Trade Commission ("FTC") and the Consumer Financial Protection Bureau ("CFPB"), which share enforcement authority with respect to the FDCPA, have endorsed the view that purchasers of defaulted consumer debts are "debt collectors" under the FDCPA.[5]

In *Fed. Trade Comm'n v. Check Investors, Inc., supra*, 502 F.3d at 171–74, the FTC successfully argued that an entity engaged in collection activity on a defaulted debt acquired from another is a "debt collector" under the FDCPA even though it "may actually be owed the debt":

> Admittedly, focusing on the status of the debt when it was acquired overlooks the fact that the person engaging in the collection activity may actually be owed the debt and is, therefore, at least nominally a creditor. Nevertheless,

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[5] As explained below, the CFPB also is authorized to promulgate rules under the FDCPA governing debt collection practices.

> pursuant to § 1692a, Congress has unambiguously directed our focus to the time the debt was acquired in determining whether one is acting as a creditor or debt collector under the FDCPA. The legislative history explains the wisdom of that provision. The term "debt collector," subject to the exclusions discussed below, was intended to cover all third persons who regularly collect debts. "The primary persons intended to be covered are independent debt collectors." S. Rep. No. 95-382, at 2, 1997 U.S.C.C.A.N. at 1697. The Senate Committee explained that the FDCPA was limited to third-party collectors of past due debts because, unlike creditors, "who generally are restrained by the desire to protect their good will when collecting past due accounts," independent collectors are likely to have "no future contact with the consumer and often are unconcerned with the consumer's opinion of them." *Id.* at 1696.

Fed. Trade Comm'n v. Check Investors, Inc., 502 F.3d at 173.

More recently, the FTC filed an amicus brief in support of rehearing in *Davidson v. Capital One Bank,* 797 F.3d 1309 (11th Cir. 2015), arguing that a purchaser of defaulted debts is a "debt collector."[6]

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[6] https://www.ftc.gov/system/files/documents/amicus_briefs/keith-davidson-v.capital-one-bank-usa-n.a./150921davidsonamicusbrief.pdf

This has been the FTC's position for over 20 years. As explained in a 1993 FTC staff opinion letter, "a party that purchases delinquent accounts from the party to which the debts were originally owed and attempts to collect them from the consumer debtors fits clearly within [the definition of debt collector]." Letter from Clarke W. Brinckerhoff to Kimberlee Arbuckle (Dec. 22, 1993), FTC Informal Staff Opinion Letter, 1993 WL 13148377 (F.T.C.).[7] According to the Opinion Letter, "[t]he party is attempting to collect debts that were 'owed or due another' and the fact that title to the accounts is passed to the collector in no way changes that fact." *Id.* The Opinion Letter continued:

> The words "for another" at the end of the clause excepting assignees from the definition of creditor in no way changes this result:
>
> > [T]he excluding factors in the exception are that the debts are

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[7] In *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000), the Supreme Court explained that interpretations such as those in opinion letters are not entitled to *Chevron*-style deference, but they are "entitled to respect" to the extent that the interpretation has the "power to persuade." *See also United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (explaining that "an agency's interpretation may merit some deference whatever its form"); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (recognizing that interpretations and opinions of administrative agencies, even "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."). A number of courts have found FTC letters to be persuasive and given them weight when interpreting the FDCPA. *See, e.g.*, *Romine v. Diversified Collection Servs., Inc.*, 155 F.3d 1142, 1147 (9th Cir. 1998).

> the result of an assignment or transfer and that the debts were already in default at the time of assignment or transfer. With the phrase "for another" at the end of the exception, Congress merely intended that the debts should have originally belonged to another and that the creditor was therefore in effect a third-party or independent creditor. (Italics by court).
>
> *Kimber v. Federal Fin. Corp.*, 668 F. Supp. 1480, 1485 (M.D. Ala. 1987). Accord, *Holmes*, *supra*, at 1293.
>
> In sum, it is our view that a party that obtains consumer obligations in default for the purpose of collection is a "debt collector" under the FDCPA, even if that party actually purchases the accounts from the original creditor.

Id.

This interpretation is also in accord with the FTC's Staff Commentary on the FDCPA, which explained that the FDCPA's definition of "creditor" "includes the party that actually extended credit or became the obligee on an account in the normal course of business, and excludes a party that was assigned a delinquent debt only for collection purposes." Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097-02, 50,101-02 (1988). Thus, the FTC consistently has

taken the view that an entity that purchases a debt in default is a debt collector under the FDCPA.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, which created the CFPB in 2011, charged the agency with shared oversight and enforcement responsibilities for the FDCPA. Pub. L. No. 111-203, § 1089(3) (2010), amending 15 U.S.C. § 1692*l*(a). In addition, the Dodd-Frank Act granted rulemaking authority under the FDCPA to the CFPB, making it the first federal agency to possess the authority to issue substantive rules for debt collection under this statute. Pub. L. No. 111-203, § 1089(4) (2010), amending 15 U.S.C. § 1692*l*(d).

On November 12, 2013, the CFPB filed an advance notice of proposed rulemaking in the Federal Register soliciting comments and information to assist the agency in developing proposed rules for debt collection. Bureau of Consumer Financial Protection, Advanced Notice of Proposed Rulemaking of November 12, 2013, Debt Collection (Regulation F), 78 Fed. Reg. 67,848-01. The CFPB unequivocally indicates that debt buyers are to be covered under the regulations. *See id.*

In July 2016, the CFPB published *Collector and Debt Buyer Rulemaking, Outline of Proposals under Consideration And Alternatives Considered*,[8] which expressly states (p. 4) that debt purchasers are covered: "The proposals under consideration discussed below would apply to small entities in the following categories for debts acquired in default: collection agencies, debt buyers, collection law firms, and loan servicers."

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[8] http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf

Other FTC and CFPB materials also evidence the agencies' understanding that debt buyers are included within the FDCPA's coverage. *See, e.g.*, January 30, 2013 FTC report, *The Structure and Practices of the Debt Buying Industry*," at pp. 3–4, *available at* www.ftc.gov/os/2013/01/debtbuying report.pdf ("Some debt buyers have argued that because they collect debts they own, not debts others own, the FDCPA does not govern their activities because they are creditors. In the seminal decision in *Kimber v. Federal Fin. Corp.*, the court rejected that argument, holding that debt buyers that seek to recover on debts that were in default when the debt buyers acquired them are debt collectors for purposes of the FDCPA. Since *Kimber*, many other courts have concluded that such debt buyers are debt collectors for purposes of the FDCPA"); FTC Report, *Collecting Consumer Debts: The Challenges of Change*, p. 5 (2009), *available at* www.ftc.gov/bcp/ workshops/debtcollection/dcwr.pdf ("The FDCPA applies to third-party 'debt collectors,' a term that includes contingency agencies, collection law firms, and debt buyers, but generally does not include creditors' in-house collectors. Congress's rationale for applying the statute only to third-party collectors was that, '[u]nlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them.'"); FTC Report, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration,* p. 6 n. 15 (2010), *available at* www.ftc.gov/os/2010/07/ debtcollectionreport.pdf.

("Debt buyers–persons who collect debt on their own behalf that they have purchased from creditors or debt collectors–are covered by the FDCPA if the accounts were in default at the time the debt buyers purchased them. FDCPA §§ 803(4), 803(6); 15 U.S.C. §§ 1692a(4), 1692a(6)"); Consumer Financial Protection Bureau, 2013 Fair Debt Collection Practices Annual Report 4 n.14 (2013) ("'Third-party debt collectors' include . . . debt buyers collecting on debts they purchased in default"), *available at* http://files.consumerfinance.gov/f/201303_cfpb_ March_FDCPA _Report1.pdf.

And, as highlighted below, this understanding of the Act's coverage is reflected in the various enforcement actions that the FTC and CFPB have brought under the FDCPA against debt buyers. *See, e.g., Fed. Trade Comm'n v. Check Investors, Inc.*, 502 F.3d at 172–74.

Moreover, Congress has acquiesced in the consistent administrative construction of the FDCPA as covering purchasers of defaulted debt who collect for their own account. The FDCPA is not an obscure enactment that escapes Congressional attention–it has been amended not fewer than 7 times since *Kimber*. (1) Pub. L. No. 111-203, Title X, §1089(2), July 21, 2010, 124 Stat. 2092. (2) Pub. L. No. 109-351, Title VIII, § 802, Oct. 13, 2006, 120 Stat. 2006. (3) Pub. L. No. 104-208, Title II, §2305(a), Sept. 30, 1996, 110 Stat. 3009-425. (4) Pub. L. No. 104-88, Title III, § 316, Dec. 29, 1995, 109 Stat. 949. (5) Pub. L. No. 102-550, Title XVI, § 1604(a)(8), Oct. 28, 1992, 106 Stat. 4082. (6) Pub. L. No. 102-242, Title II, § 212(e), Dec. 19, 1991, 105 Stat. 2301. (7) Pub. L. No. 101-73, Title VII, § 744(n), Aug. 9, 1989, 103 Stat. 440. At no time has Congress rejected the

consistent construction of the FTC and the CFPB that purchasers of defaulted debts are covered.

F. The Fourth Circuit's Position Has Broad Implications for the Massive and Growing Debt Buyer Industry

The conclusion that the FDCPA applies to debt buyers makes particular sense in light of the massive growth of the debt buying industry since the FDCPA was passed in 1977. "The practice of creditors selling consumer debts on a large scale has its origins in the savings and loan crisis of the late 1980s and early 1990s." Fed. Trade Comm'n, The Structure and Practices of the Debt Buying Industry 12 (2013) *available at* www.ftc.gov/os/2013/01/debtbuyingreport.pdf (hereinafter, "Structure and Practices"). The debt buying industry has rapidly grown since. According to Robert M. Hunt's presentation at the Consumer Financial Protection Bureau and Federal Trade Commission's Joint Roundtable Discussion, "Understanding the Model: The Life Cycle of a Debt" (June 6, 2013), slide 19[9] shows that hundreds of billions of dollars of consumer debt has been sold to debt buyers:

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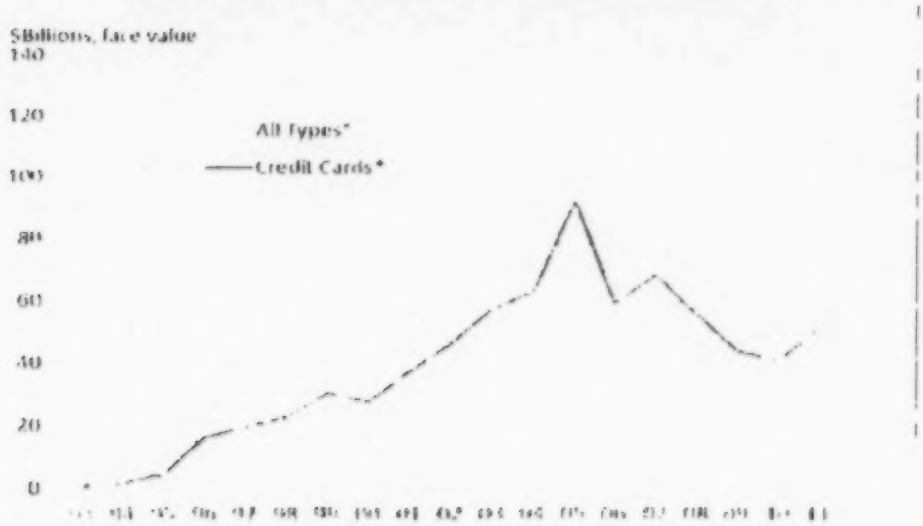
[9] https://www.ftc.gov/sites/default/files/documents/public_events/life-debt-data-integrity-debt-collection/understandingthemodel.pdf

Sales of Consumer Debt in Default



The large amount of money involved has attracted numerous new entrants into the debt buying business. In 2010, the Wall Street Journal reported that "[m]ore than 450 debt buyers scooped up an estimated $100 billion in distressed loans last year." Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom—In Lawsuits*, WALL ST. J., Nov. 29, 2010, at A1, *available at* http://online.wsj.com/article/SB10001424052702304510704575562212919179410.html. As noted above, most of these debts are purchased for pennies on the dollar, if not less. *See, e.g., Gonzales v. Arrow Fin. Services, L.L.C.*, 660 F.3d 1055, 1059 n. 1 (9th Cir. 2011); Consumer Fin. Prot. Bureau, Market Snapshot: Online Debt Sales 5 (2017) ("The three online marketplaces reviewed offered 298 portfolios with an aggregate face value of almost $2 billion and an aggregate asking price of roughly $18 million. These portfolios include at least 1.2 million accounts, each of which may contain

> consumers' personal information. The average asking price per dollar of face value is just under one cent. More than one hundred of the portfolios had asking prices of $0.004 (or 0.4¢) or less per dollar. There are some portfolios, including one with a face value of $156 million on sale for $125,000, which had asking prices lower than $0.001 (or 0.1¢) per dollar.").

The FTC reported in 2013 that "there now appear to be hundreds, if not thousands, of entities of varying sizes that purchase debts." Structure and Practices 14. And, as noted by the FTC in Structure and Practices, the practices of smaller debt buyers "are a frequent source of consumer protection concerns." *Id.* at i. Many of these consumer protection concerns stem from the limited information that is actually transferred at the time of the purchase of the defaulted debts; the FTC found that debt buyers typically "obtained very few documents related to the purchased debts at the time of sale or after purchase." *Id.* at iii. The FTC also found that debt buyers only receive documentation for approximately 12% of the debts they attempt to collect. *Id.* at 35. This creates an environment that is ripe for abuse.

Indeed, there are numerous examples of the FDCPA being used to curb abuses by unethical debt buyers. In 2004, the FTC filed a complaint against Capital Acquisitions and Management Corp. ("CAMCO"), its subsidiary and its principals after CAMCO "engaged in systematic and widespread violations of the [FDCPA]." *See* Press Release, Federal Trade Commission, Debt Buyer/Debt Collection Companies and Their Principals Settle FTC Charges (Mar. 24, 2004), *available at*

https://www.ftc.gov/news-events/press-releases/2004/03/debt-buyerdebt-collection-companies-and-their-principals-settle. As the FTC stated, "CAMCO is a 'debt buyer'–a company that buys old debts well past the statute of limitations and attempts to collect them." *Id.* Among other violations, CAMCO's collectors threatened consumers with arrest, used profanity, called consumers at their workplaces and refused to heed the consumers' requests to stop calling. *Id.* Indeed, CAMCO engaged in similar misconduct even after settling the FTC's initial lawsuit, ultimately being shut down by a court-appointed receiver later that year when the violations continued. *See* Press Release, Federal Trade Commission, Debt Collector Settles with FTC for Abusive Practices (Mar. 12, 2007), *available at* https://www.ftc.gov/news-events/press-releases/2007/03/debt-collector-settles-ftc-abusive-practices.

Similarly, the Third Circuit remarked of the defendant debt buyer in *Check Investors*, 502 F.3d at 172–73, that "[n]o merchant worried about goodwill or the future of his/her business would have engaged in the kind of conduct that was the daily fare of the collectors at Check Investors." *Check Investors*, 502 F.3d at 174. That debt buyer's "primary *modus operandi* was to accuse consumers of being criminals or crooks, and threatening them with arrest and criminal or civil prosecution." *Id.* at 163. The Third Circuit found that "[t]he collectors working there resorted to whatever harassment appeared likely to succeed; the only limit appears to have been a given tactic's likelihood of bearing fruit by yielding a profit." *Id.* at 174.

In short, a massive industry now exists of hundreds or thousands of companies buying

approximately one hundred billion dollars of defaulted consumer debt annually in the United States that embodies the exact relationship to consumers that creates the opportunities for abuse that Congress intended to prevent with the FDCPA. Yet Santander's position would exempt a whole class of debt buyers from the FDCPA. Santander's reasoning, if adopted, would open a massive loophole in the FDCPA "big enough to devour all of the protections Congress intended in enacting that legislation," and would grant debt buyers a competitive advantage over other debt collectors that would cause an even larger growth in debt buying. *Check Investors*, 502 F.3d at 172–73.[10]

The only reasonable and consistent construction of the FDCPA that is consistent with its intended purpose is that persons who acquire and collect debts (1) are "debt collectors" with respect to those debts which are purportedly in default at the time they are acquired, whether they regularly or principally acquire such debts but (2) are not debt collectors with respect to current debts.

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[10] If the Court adopts Santander's bottom line position, the scope of its holding should nonetheless exclude debt buyers that have a "business the principal purpose of which is the collection of any debts." 15 U.S.C. § 1692a(6). The FDCPA uses disjunctive "or" language in its definition of debt collector. The first "principal purpose" clause includes no limitation that the debt be "due another." *Id.* The vast segment of the debt industry that exists solely to purchase and collect debt, therefore, should remain untouched by an opinion based on the second clause of the definition.

CONCLUSION

For the foregoing reasons, amici curiae respectfully request that the Fourth Circuit's decision in this matter be reversed.

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IN THE

Supreme Court of the United States

RICKY HENSON, *et al.*,
Petitioners,

v.

SANTANDER CONSUMER USA, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE STATES OF OREGON, ALASKA, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, ILLINOIS, IOWA, INDIANA, KANSAS, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MINNESOTA, MONTANA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, PENNSYLVANIA, RHODE ISLAND, VERMONT, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Fair Debt Collection Practices Act, 15 U.S.C. §1692 *et seq.*, regulates the conduct of "debt collector[s]." Is a company that regularly attempts to collect debts it purchases after the debts have fallen into default a "debt collector"?

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Press Release, *CFPB Takes Action Against the Two Largest Debt Buyers for Using Deceptive Tactics to Collect Bad Debts*, CFPB (Sept. 9, 2015) 9

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INTEREST OF THE AMICI STATES

The States of Oregon, Alaska, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, Vermont, and Washington, and the District of Columbia, have a strong interest in protecting consumers from unlawful debt-collection practices. Debt-collection abuse is one of the most frequent consumer complaints made to state Attorneys General. As Congress recognized in enacting the Fair Debt Collection Practices Act (FDCPA), abusive debt-collection practices contribute to "personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy," inflicting irreparable injury not only on individual consumers but on their families and communities as well. 15 U.S.C. § 1692(a). Abusive debt collectors also strain state resources by clogging the court systems, particularly small-claims courts, with their filings. *See, e.g.*, Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6. J. Bus. & Tech. L. 259, 261 (2011); Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 Harv. J. on Legis. 41, 55 (2015).

Congress enacted the FDCPA in part to "promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). It understood that although States could regulate debt collectors under state law, they had not all done so in a meaningful way. S. Rep. No. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696–97. The FDCPA established a uniform nationwide floor to

protect consumers from, among other things, "unscrupulous debt collectors who harass consumers from another State." *Id.* at 3, 1977 U.S.C.C.A.N. at 1697.

The *Amici* States thus have a direct interest in ensuring that the FDCPA is correctly interpreted to cover those who attempt to collect defaulted debt they have purchased. Debt buyers who purchase defaulted consumer debt—usually for pennies on the dollar—and then attempt to collect that defaulted debt are, from a consumer's perspective, no different from debt collectors who do not own the debt. While debt buyers can and should be able to pursue lawful means of debt collection, the law should protect consumers from unscrupulous and harassing collection tactics by such companies.

Proper interpretation of the FDPCA is also important to the effective enforcement of state consumer-protection laws. State courts frequently look to federal FDCPA decisions when interpreting parallel state laws. And the definitions used in many state consumer-protection laws are expressly linked to the definitions in the FDCPA. Thus, an erroneous interpretation of the federal law threatens to undermine the effective enforcement of state consumer-protection statutes as well.

SUMMARY OF ARGUMENT

A debt buyer is a "debt collector" if it regularly attempts to collect debts that were in default at the time the debts were purchased. Although the FDCPA's relevant definition of debt collector requires that the debts be "owed or due or asserted to be owed or due another," 15 U.S.C. § 1692a(6), the proper inquiry is whether the debt was owed or due another at the time it originated, not at the time of collection.

That interpretation of the statute is consistent not only with the FDCPA's text and purpose, but also with common sense. Congress enacted the FDCPA to regulate the practices of debt collectors because collectors, unlike original creditors, have no ongoing relationship with debtors, and thus are unlikely to be concerned about preserving their reputation or goodwill. Debt buyers, like debt collectors, have no ongoing relationship with debtors. Indeed, from the consumer's perspective, a debt buyer is no different from a debt collector, and there is no reason to treat one differently from the other.

Even more importantly, excluding debt buyers from the FDCPA's definition of debt collector would create a regulatory void that Congress could not have intended. Many States' debt collection laws are modeled on the FDCPA's protections. Other States have no comprehensive debt collection legislation, relying almost entirely on the FDCPA to curb abusive practices in their states. If debt buyers were not covered by the FDCPA, then consumers in those States would have little to no protection against harassing debt-collection practices by debt buyers. Because of the challenges posed by enforcement actions against national or out-of-state companies, States often rely on federal standards to rein in the worst offenders. Thus, although States are free to enact legislation that is more protective than the FDCPA, it remains important for federal law to set a robust floor for this industry.

ARGUMENT

The FDCPA defines a "debt collector" in relevant part as "any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15

U.S.C. § 1692a(6). The question presented here turns on *when* the debts must have been "owed or due another"—specifically, whether they must have been owed another at the time of *collection*, or whether it is enough that they were owed another at the time the debts *originated*.

As explained below, a debt is "owed or due another" if it was originated by someone else, even if the debt is no longer "owed or due" to the originator. Thus, a debt buyer who—like respondent—regularly attempts to collect debts it purchases after the debts have fallen into default is a debt collector regulated by the FDCPA. The text and the broader structure of the statute support that conclusion, and a contrary holding would leave a gaping regulatory void that Congress could not have intended.

A. The FDCPA's text demonstrates that whether debts are "owed or due another" depends upon the status of the debts at the time of origination, regardless of who owns the debts at the time of collection.

Two key provisions of the FDCPA confirm that debts are "owed or due another" if they were owed or due another at the time of origination, regardless of who owns or possesses the right to pursue the debts at the time of collection.

The first provision is the definition of "debt collector." Congress specifically excluded from the definition of debt collector "any person collecting or attempting to collect any debt owed or due another to the extent such activity . . . (iii) concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii). That exception makes sense only if a person may "obtain[]" a debt that remains

"owed or due another." It would be rendered meaningless if the act of obtaining a debt from another means that the debt is no longer "owed or due another." Thus, debts are "owed or due another" if they were originally owed another, regardless of who owns the debt at the time of collection. And the exclusion applies only if the person obtained such a debt when it was not in default.

The second provision is the definition of "creditor." The FDCPA defines "creditor" as "any person who offers or extends credit creating a debt or to whom a debt is owed." 15 U.S.C. § 1692a(4). But it excludes "any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating the collection of such debt for another." 15 U.S.C. § 1692a(4). Thus, the statute contemplates that a person can receive an "assignment or transfer" of a debt but still be collecting the debt "for another." This too suggests that whether the debt is owed another must be determined as of the time the debt originated, not the time of collection.

Together, these two provisions resolve any ambiguity that the phrase "owed or due another" might have in isolation. Because someone can obtain (by assignment, transfer, or otherwise) a debt that is owed another, it must be the time of origination, not the time of collection, that governs whether the debt is owed another. Thus, a company that regularly attempts to collect defaulted debt that it has purchased is a "debt collector" as the FDCPA defines that term.

B. The broader structure and purpose of the FDCPA confirm that purchasers of defaulted debt are debt collectors.

The FDCPA distinguishes between "debt collectors," who are subject to the statute's requirements, and

"creditors," who are not. 15 U.S.C. §§ 1692a to 1692k. Congress chose to distinguish between debt collectors and creditors, and to regulate collection practices by debt collectors only, because it recognized that creditors "generally are restrained by the desire to protect their good will when collecting past due accounts." S. Rep. No. 95-382, at 2, *reprinted in* 1977 U.S.C.C.A.N. at 1696. By contrast, "independent collectors are likely to have no further contact with the consumer and often are unconcerned with the consumer's opinion of them." *Id.*

Recognizing this practical difference, Congress crafted the definitions of "debt collectors" and "creditors" to ensure that the statute covers the category of actors and relationships it was concerned about. For example, Congress expressly included in the definition of "debt collector" companies who use a third-party name to collect. 15 U.S.C. § 1692a(6) ("debt collector" "includes any creditor who in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts"). Creditors who collect by using a third-party name would not have the same reputational constraints as creditors collecting in their own name.

Similarly, as discussed above, Congress exempted from the definition of "debt collectors" a person who attempts to collect a debt that was *not* in default at the time the person obtained it. 15 U.S.C. § 1692a(6)(F)(iii). This makes sense: If a company acquires a non-defaulted debt to service it, it is acting more like the original creditor and has an ongoing relationship with the consumer. The company's interest in protecting its reputation and good will with customers may be enough to constrain it from engaging in abusive practices.

Thus, Congress did not see the need to extend the FDCPA's protections to that particular type of relationship.

But regular buyers of *defaulted* debt generally do not have similar incentives. If a company acquires debt that is in default for the purpose of collecting that defaulted debt, it does not have the ongoing servicing relationship with the consumer that Congress envisioned. It is instead acting like what it is—a debt collector.

Congress would not have intended to exempt debt buyers because debt buyers pose the same threat to consumers as other regulated debt collectors. Debt buyers are generally entities who specialize in collections, even if collection is not their principal purpose. Jiménez, *supra*, at 42, 52. They purchase defaulted debt, usually for pennies on the dollar, that has been deemed uncollectable by the original creditor. Holland, *supra*, at 260. The debt is usually part of a large portfolio of defaulted debts. Jiménez, *supra*, at 52–54. The underlying debts are often sold many times over. *Id.*

These characteristics of debt buyers lead them to engage in the very kind of debt-collection activities that the FDCPA is meant to prevent. For example, debt buyers often lack the "formal proof that complies with the forum state's rules of evidence." Holland, *supra*, at 261. That is so because when a debt buyer purchases defaulted debt, it often does not acquire documentation about the underlying accounts such as monthly statements, contracts, or account applications. Jiménez, *supra*, at 65. Instead, the debt buyer usually purchases the "assignment of the right to collect and a spreadsheet" with minimal information about the alleged debt and debtor. *Id.* at 43.

Nonetheless, the debt buyer sues; the alleged debtor rarely responds; and the debt buyer obtains a default judgment against the alleged debtor—without ever documenting the debt's validity. Jiménez, *supra*, at 55. Thousands of debt-collection lawsuits are filed every day, "most of them by debt buyers." *Id.* Of those filed by debt buyers, a remarkable 70-90% result in default judgments. *Id.*

These suits are of at least equal concern when brought by debt buyers rather than traditional debt collectors. A key reason consumers fail to respond to lawsuits by debt buyers is that the consumer often does not recognize the company or the asserted debt because there is no identifiable tie to the original debt or creditor. From a consumer's perspective, there is no difference between a debt collector who bought the defaulted debt and one who is trying to collect for someone else.

Default judgments against such consumers are particularly troubling because, in many cases, the debt should not have been collected at all—it was paid in full, cleared in bankruptcy, or the statute of limitations had passed. *See, e.g.*, Holland, *supra*, at 270 n.75 (identifying numerous cases in which a debtor had settled or paid the debt prior to being sold). The most common consumer complaint about debt collection is that the collector continues to try to collect a debt that is not owed. Jiménez, *supra*, at 75; Fair Debt Collection Practices Act, CFPB Annual Report 2016 at 18 (March 2016).[1]

Applying the FDCPA to debt buyers ensures that those entities are subject to important restrictions and

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[1] *Available at* http://files.consumerfinance.gov/f/201603_ cfpb-fair-debt-collection-practices-act.pdf.

obligations for their activity across the country. For example, the FDCPA requires that within five days of first communicating with a consumer, a debt collector provide written notice about the amount of the debt, the consumer's right to contest the validity of the debt, and the consumer's right to request the name of the original creditor. 15 U.S.C. § 1692g(a). That information is just as important to a consumer dealing with a collector who *purchased* defaulted debt as it is to a consumer dealing with one who did not.

Not surprisingly, then, both regulators and regulated entities have long understood the FDCPA to cover purchasers of defaulted debt, as Congress intended. The Federal Trade Commission and Consumer Financial Protection Bureau, which share authority to enforce the FDCPA, have consistently taken that position. *See, e.g.*, *FTC v. Check Investors*, 502 F.3d 159, 172–74 (3d Cir. 2007); FTC, *The Structure and Practices of the Debt Buying Industry* 3–4 (Jan. 2013) (debt buyers are within the FDCPA's definition of "'debt collectors," and so the FDCPA "applies to the activities of debt buyers that purchase accounts in default"); Press Release, *CFPB Takes Action Against the Two Largest Debt Buyers for Using Deceptive Tactics to Collect Bad Debts*, CFPB (Sept. 9, 2015)[2] (settlement of suit against debt buyers who purchased defaulted debt); Press Release, *Debt Buyer/Collection Companies and Their Principles Settle FTC Charges*, FTC (Mar. 24, 2004)[3] (settlement

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[2] *Available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-the-two-largest-debt-buyers-for-using-deceptive-tactics-to-collect-bad-debts/.

[3] *Available at* https://www.ftc.gov/news-events/press-releases/2004/03/debt-buyerdebt-collection-companies-and-their-principals-settle.

of suit against debt buyers who purchased defaulted debt).

Similarly, trade associations for the debt-buying industry have acknowledged that "[a]lthough 15 U.S.C. § 1692a(6) exempts creditors from the definition of 'debt collector,' debt buyers who purchase debts after default do not enjoy the benefits of that exemption and they are treated as 'debt collectors' for FDCPA purposes." Brief for the Commercial Law League of America and DBA International as Amici Curiae Supporting Respondents, at 12, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (November 30, 2009) (No. 08-1200).

These views reflect a commonsense understanding of the FDCPA and the congressional intent behind it. From consumers' perspective, a company that buys defaulted debts and then tries to collect them is no different from a company that tries to collect debts without buying them. The overall structure and purpose of the FDCPA confirm that Congress intended both to be subject to the statute's requirements for debt collectors.

C. Excluding debt buyers from the FDCPA would result in regulatory voids that Congress could not have intended.

Respondent has suggested that it is unimportant for the FDCPA to cover debt buyers, because state law can fill the resulting regulatory voids. Br. in Opp. 25. That suggestion misunderstands the limitations of state law in this area. Although States can enact laws that are more protective of consumers than the FDCPA,[4]

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[4] *See* 15 U.S.C. § 1692n (FDCPA does not "annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with

there are important reasons for the FDCPA to set a uniform floor for debt-collection protections that includes debt buyers. *See* 123 Cong. Rec. 10,244 (1977) (FDCPA provides for important "standardization and uniformity" in debt-collection protections).

First, States have shaped their laws in reliance on the FDCPA's protections. Some States, like Delaware, have not enacted any comprehensive state law governing debt-collection practices, instead relying on the FDCPA to protect their consumers. If the FDCPA did not apply to debt buyers, consumers in those States might have no protection from harassing debt-collection practices by debt buyers.

Even among those States with debt-collection laws, many expressly link the scope of their laws to the FDCPA. *See, e.g.*, Ala. Code § 40-12-80 (2016) (incorporating FDCPA definition of "debt collector"); Idaho Code Ann. § 26-2229A (2016) (providing for a state cause of action by director of finance against licensed collection agencies for violation of any provision of the FDCPA that is not inconsistent with a state statute); Minn. Stat. § 332.37(12) (2017) (incorporating provisions of the FDCPA); Wash. Rev. Code. § 19.16.100(10) (2016) (defining "out-of-state collection agency" to exclude any person who is excluded from "debt collector" under the FDCPA).

In other States, the interpretation of the FDCPA may affect the meaning of state law. *See, e.g.*, Fla. Stat. § 559.77(5) (2016) (Florida courts must give "great

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respect to debt collection practices, except to the extent those laws are inconsistent with any provision" of the FDCPA and "a State law is not inconsistent with" the FDCPA "if the protection such law affords any consumer is greater than the protection provided by this subchapter.").

weight" to federal interpretations of the FDCPA when interpreting and applying the Florida Consumer Collection Practices Act); *Centurion Capital Corp. v. Druce*, 828 N.Y.S.2d 851, 853 (Civ. Ct. 2006) (because local statute was patterned on the FDCPA, court looks to interpretations of the federal act for guidance).

And even States that have enacted statutes that are entirely independent of the FDCPA may have chosen, in view of the FDCPA's remedial provisions, to have narrower remedies under state law. For example, the FDCPA provides for a private right of action and statutory damages. 15 U.S.C. § 1692k. Not all state debt collection laws offer those same remedies. *See, e.g.*, N.Y. Gen. Bus. Law §§ 600 to 603 (2017) (no private remedy for most unlawful debt collection practices under state law); Md. Code Ann., Com. Law § 14-203 (2016) (violator of state's debt collection statutes only "liable for any damages proximately caused by the violation").

Second, there are practical and legal drawbacks to relying on state rather than federal law for enforcement efforts. Debt buyers are a difficult target for state enforcement even when a state's laws reach those companies' collection activities. As Congress recognized in enacting the FDCPA, debt collectors can harass consumers from across state lines, and state Attorneys General may find it hard to enforce their more protective laws in those circumstances. S. Rep. No. 95-382, at 3, *reprinted in* 1977 U.S.C.C.A.N. at 1697.

A strong federal law also facilitates coordinated federal and state enforcement targeting the worst offenders. Debt buyers tend to be large national companies with deep pockets who are costly targets for state Attorneys General to pursue. States sometimes

can address that concern by pooling resources to collaborate on multistate enforcement actions. But to do so effectively, States generally must focus only on areas where the same legal standards apply, which can limit their reach. And companies are generally more willing to settle enforcement actions that involve a uniform federal standard instead of a patchwork of state laws.

Ultimately, if purchasers of defaulted debt like respondent were not subject to the FDCPA, then many abusive debt-collection practices would continue unfettered. Nothing in the text or legislative history of the FDCPA indicates that Congress would have intended that result.

CONCLUSION

The Court should reverse the judgment of the Court of Appeals dismissing petitioners' complaint and remand for further proceedings.

Respectfully submitted,

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RECORD AND BRIEFS

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In the Supreme Court of the United States

RICKY HENSON, IAN MATTHEW GLOVER, KAREN PACOULOUTE, F/K/A/ KAREN WELCOME KUTEYI, AND PAULETTE HOUSE,

Petitioners,

v.

SANTANDER CONSUMER USA, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE PUBLIC COUNSEL IN SUPPORT OF PETITIONERS

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W. Va. Code § 46A-5-101 14
Wis. Stat. § 427.105 14
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LEGISLATIVE MATERIAL

Fair Debt Collection Practices Act: Hearings on S. 656 et al. Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs, 95th Cong., 1st Sess. (1977) 5, 6
H.R. Rep. No. 131, 95th Cong., 1st Sess. (1977) 4, 6
S. Rep. No. 382, 95th Cong., 1st Sess. (1977) 4, 7

The Debt Collection Practices Act: Hearings on H.R. 29 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Finance and Urban Affairs, 95th Cong., 1st Sess. (1977) 5, 7
The Debt Collection Practices Act: Hearings on H.R. 11969 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Currency and Housing, 94th Cong., 2d Sess. (1976) 8

OTHER AUTHORITIES

Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2016* 12
DBA International, *Government Advocacy* 16
Encore Capital Group, Annual Report (Form 10-K) (Feb. 24, 2016) 9
EY, *The Impact of Third-Party Debt Collection on the U.S. National and State Economies in 2013* (2014) 8, 9
Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change* (2009) 10, 12, 15
Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* (2013) 11, 12
Government Accountability Office, *Credit Cards: Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology* (2009) 11, 12

IBISWorld Industry Report 56144: Debt Collection Agencies in the US (December 2016) 9, 10
Mississippi Office of the Attorney General, *A Consumer's Guide to Mississippi Consumer Protection Law* 14
National Consumer Law Center, *Fair Debt Collection* (8th ed. 2014) 13
PRA Group, Inc., Annual Report (Form 10-K) (Feb. 26, 2016) 11
Virginia Office of the Attorney General, *Consumer—Debt Collection* 13

INTEREST OF AMICUS CURIAE

Public Counsel is the largest *pro bono* law firm in the nation. Its 71 attorneys and 50 support staff—along with over 5,000 volunteer lawyers, law students, and legal professionals—assist more than 30,000 individuals, families, and community organizations every year. The Consumer Law Project is one of Public Counsel's original projects. From its inception, it has assisted thousands of low-income consumers in resolving claims of unfair business practices, fraud, misrepresentation, and a wide range of consumer issues. Public Counsel regularly brings cases under the Fair Debt Collection Practices Act and California's most closely analogous statute, the Rosenthal Fair Debt Collection Practices Act, and counsels many more consumers on their rights under these acts.

Public Counsel represents consumers who are harassed by unscrupulous debt collectors, including debt purchasers, in violation of the FDCPA. If a firm that purchases and collects defaulted debt is not a "debt collector" under the FDCPA, these consumers will be left exposed to the abusive practices that motivated the FDCPA's enactment, because state law offers little protection.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket consents to the filing of amicus briefs.

SUMMARY OF ARGUMENT

Congress enacted the FDCPA because it found that the states were unable to protect consumers against abusive debt collectors. State officials explained that they could do little about unscrupulous collectors who harassed local residents by calling from out of state. They pleaded with Congress to do something about the problem. Even spokespeople for the debt collection industry conceded that state regulation was no match for interstate debt collectors. In enacting the FDCPA, Congress recognized that state regulation of the industry was completely ineffective.

In the forty years since the FDCPA was enacted, the inadequacies of state law have been exacerbated by changes in the size and structure of the debt collection industry. The industry, including firms that purchase debt, is hundreds of times larger than it was in 1977. The firms that make up this industry are multinational corporations with computerized call centers all over the world. Today, when a consumer is harassed by an abusive debt collector, the call is likely to be placed by a sophisticated software program, and the person with whom the consumer speaks may be in India or the Philippines. The states are even less able to protect their residents than they were in 1977.

When the FDCPA was enacted, the debt collection industry consisted almost entirely of firms that earned a percentage of each debt collected. Today, the purchase and collection of delinquent debt portfolios generates nearly a third of the industry's reve-

nue. Buying debt has become one of the main methods of collecting it.

If the FDCPA does not prohibit deceptive practices by debt purchasers, those practices will flourish, because state law generally offers very weak protection. Some states have no statutes at all regulating the debt collection industry. Some merely require debt collectors to obtain a license but impose no substantive regulation. These states are entirely reliant on the FDCPA to protect their residents. Among the states that do regulate the conduct of debt collectors in some way, many do not provide consumers with a private right of action. This is a crucial shortcoming, because the enormous volume of complaints makes it impossible for state governments to pursue more than a tiny fraction of violators. Many state laws exempt large categories of debt collectors that are covered by the FDCPA, and many state laws offer weaker substantive protection than the FDCPA does. In short, if firms that purchase defaulted debt and then collect it are not "debt collectors" under the FDCPA, consumers will be left exposed to the abusive practices Congress intended to stop, because the states are not equipped to handle this problem.

ARGUMENT

If the FDCPA does not prohibit deceptive practices by debt purchasers, those practices will flourish, because state law is inadequate to protect consumers.

If the Fair Debt Collection Practices Act does not cover debt purchasers, consumers' primary defense

against unscrupulous debt buyers will be state law. But state law is utterly inadequate for this purpose. Congress enacted the FDCPA precisely because it determined that the states were unable to protect consumers from unscrupulous collectors. In the forty years since, the problem has grown even worse. Debt collectors, including debt purchasers, are much larger and more sophisticated than they were when the FDCPA was enacted. The debt collection industry is interstate and even international, so the states have scant ability to regulate it effectively. Some states provide consumers no protection at all, and others have laws substantially weaker than the FDCPA. Debt purchasers' deceptive practices will flourish if debt purchasers are not covered by the FDCPA, because state law offers little recourse.

A. Congress enacted the FDCPA because it found that the states could not protect consumers from unscrupulous debt collectors.

Congress enacted the FDCPA because "collection abuse has grown from a State problem to a national problem." S. Rep. No. 382, 95th Cong., 1st Sess. 2 (1977). Congress found that "State officials are unable to act against unscrupulous debt collectors who harass consumers from another State." *Id.* at 3. Before the FDCPA was enacted, the problem was so bad that the House Banking Committee called interstate debt collection "a major lawless area. State laws do not and cannot regulate interstate debt collection practices." H.R. Rep. No. 131, 95th Cong., 1st Sess. 3 (1977).

Congress reached this conclusion after hearing extensive testimony from state officials about the difficulties they faced when trying to protect their residents from out-of-state debt collectors. The Chief of California's Bureau of Collection and Investigative Services lamented that his state could not "in an effective manner control calls coming into California from outside of the State," even though California had "the best regulatory effort in the Nation." *The Debt Collection Practices Act: Hearings on H.R. 29 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 337 (1977).

The Director of Minnesota's Office of Consumer Services agreed that her own state's law "does not offer citizens the necessary protections." *Id.* at 349. She estimated that 30 to 40 percent of debt collection complaints in Minnesota were about collectors located in other states. *Id.* at 366. She provided multiple examples of frustrated Minnesotans who had been hounded by out-of-state debt collectors. *Id.* at 350-51. "We do need Federal standards that govern interstate activity," she urged. "It is very difficult to police, for example, a California-based agency effectively." *Id.* at 365.

Officials from other states described similar enforcement problems. An Assistant Attorney General of Massachusetts explained that his office could do little about debt collectors who harmed Massachusetts residents "without actually coming physically into the state." *Fair Debt Collection Practices Act: Hearings on S. 656 et al. Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking,*

Housing and Urban Affairs, 95th Cong., 1st Sess. 608 (1977). An Assistant District Attorney from New York called abusive debt collection practices "crimes of the telephone" that were impossible to prosecute when committed by "an out-of-state corporation that kept all managerial control at the home office." *Id.* at 598. He despaired that state law was "useless in curbing serious abuses in the debt collection area." *Id.*

Even spokespeople for the debt collection industry recognized that state regulation was no match for interstate debt collectors. The President of the American Credit and Collection Institute conceded: "when you say that the States aren't handling it, you're absolutely right. And when you say that we need Federal legislation, we do." *Id.* at 199. The Secretary-Treasurer of the International Consumer Credit Association likewise acknowledged that "[t]he collection agency field is one that particularly lends itself to federal regulation" because "collection agencies are increasingly operating across state lines." *Id.* at 767.

Congress found that new technology was compounding the problem of interstate debt collection. The advent of WATS lines—flat-rate long-distance telephone service—greatly reduced the cost of making large numbers of interstate telephone calls. The House Banking Committee noted that this development "has multiplied the number of interstate debt collection abuses. A debt collector can harass a consumer with impunity by calling from one State into another." H.R. Rep. No. 131, at 3. The Senate Banking Committee agreed that "State law enforcement officials have pointed to this development as a prime

reason why federal legislation is necessary." S. Rep. No. 382, at 2-3.

In addition to recognizing the inherent inability of the states to regulate interstate debt collection, Congress also determined that the FDCPA was necessary because state laws were too few, too lenient, and too inconsistent to protect consumers. "The primary reason why debt collection abuse is so widespread," explained the Senate Banking Committee, "is the lack of meaningful legislation on the State level." *Id.* at 2. Thirteen states, with a total population of 40 million, had no debt collection laws at all. *Id.* Another eleven states, with another 40 million citizens, had "laws which in the committee's opinion provide little or no effective protection." *Id.* And of the remaining states, few had laws that gave consumers any civil remedy against abusive debt collectors. *Id.* In many states, the field was regulated by debt collection boards, the majority of the members of which had to be debt collectors. *Id.* As the House sponsor of the FDCPA quipped, "[t]his is not even sending the fox to guard the chickens; it is sending the chickens to the fox's house to be guarded." *Hearings on H.R. 29*, at 333.

In short, Congress enacted the FDCPA because state regulation of the debt collection industry was "so weak as to be totally ineffective." *Id.* at 1. It was simply "impossible for the individual States to control the debt collection industry." *Id.*

B. Changes in the size and structure of the debt collection industry since 1977 have only exacerbated the inadequacies of state law.

In the forty years since the FDCPA was enacted, the inadequacies of state law have been exacerbated by changes in the size and structure of the debt collection industry. Debt collectors, including firms that purchase debt, are much larger and more sophisticated than they were in 1977. They operate on an international scale, with call centers around the world, which makes effective state regulation impractical. State laws governing debt collectors, ineffective in 1977, have become even less effective today, as states have come to rely ever more on the federal government to protect their residents against unscrupulous collectors.

The debt collection business, including firms that purchase debt, is hundreds of times larger than it was when the FDCPA was enacted. In 1977, the entire industry attempted to collect $3 billion of debt. *The Debt Collection Practices Act: Hearings on H.R. 11969 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Currency and Housing*, 94th Cong., 2d Sess. 23 (1976). Today that number is over $750 billion. EY [formerly Ernst & Young], *The Impact of Third-Party Debt Collection on the U.S. National and State Economies in 2013*, at 5 (2014).[2] The debt collection industry employs more than 130,000 people, most of whom are tele-

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[2] Available at http://www.wacollectors.org/Media/Default/PDFs/_images_21594_impacteconomies2014.pdf.

phone collectors who call consumers regarding overdue bills. *Id.* at 8.

The individual firms that make up the debt collection industry are also much larger than they were when the FDCPA was enacted. In 1977, the states were stymied by small companies making phone calls across state lines. Now the leading debt collectors are huge firms with call centers all over the world. Expert Global Solutions, the firm with the largest market share in the industry, has over 42,000 employees in ten countries, including the Philippines and India. *IBISWorld Industry Report 56144: Debt Collection Agencies in the US* 26 (December 2016).[3] Encore Capital Group, another major debt collector with approximately 6,700 employees (and one of the largest purchasers of debt), reports that "[a]ccounts originated in the United States are serviced through our call centers in the United States, India and Costa Rica." Encore Capital Group, Annual Report (Form 10-K) 1, 13 (Feb. 24, 2016).[4] It was hard enough for the states to control debt collectors a few miles away in another state; it is now virtually impossible for states to control debt collectors on the other side of the world.

Debt collectors can now reach consumers by exploiting technologies that were scarcely imaginable in 1977. When the FDCPA was enacted, debt collection consisted primarily of manually dialed calls to

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[3] Available at http://clients1.ibisworld.com/reports/us/industry/default.aspx?entid=1474.

[4] Available at http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NjExNzY5fENoaWxkSUQ9MzI1MTY3fFR5cGU9MQ==&t=1.

landline telephones (which lacked answering machines) and letters, typed one-by-one and sent by U.S. mail. Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change* 15 (2009).[5] Now debt collectors use predictive dialers—computer systems that determine whom and when to call, and then place the calls automatically. *Id.* at 16. Debt collectors also reach consumers through mobile phones and email. *Id.* at 15. As it has become harder for states to restrain unscrupulous collectors, it has simultaneously become much easier for unscrupulous collectors to harass consumers.

On top of all these developments, "[t]he most significant change in the debt collection business in recent years has been the advent and growth of debt buying." *Id.* at 13. When the FDCPA was enacted, the debt collection industry consisted almost entirely of firms that earned a percentage of each debt collected. Now, "[t]he purchasing of delinquent debt portfolios generates about 32.0% of industry revenue, and has become an increasingly popular alternative to contingent-fee servicing over the past two decades." *IBISWorld Industry Report* at 15. "Industry operators typically purchase these portfolios at a deep discount from the aggregate principal value of the accounts," and then "employ traditional collection techniques to obtain payment of nonperforming accounts." *Id.* These are the traditional techniques of *collectors*, not the relationship-maintaining methods

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[5] Available at https://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf.

used by original lenders. More and more, buying debt has become just one more way of collecting it.

Debt purchasing is dominated by a handful of very large international firms. Nine of the ten largest debt buyers purchased 76.1 percent of all consumer debt sold in 2008. Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* 7 (2013).[6] For example, one of the largest debt buyers is The PRA Group (formerly called Portfolio Recovery Associates). The PRA Group has call centers in the United Kingdom, Germany, Austria, Finland, Luxembourg, Spain, Norway, Sweden, Canada, and Brazil—not to mention Alabama, Pennsylvania, California, Virginia, Texas, Kansas, Tennessee, Nevada, and Illinois. PRA Group, Inc., Annual Report (Form 10-K) 30 (Feb. 26, 2016).[7] Heaven help the state official responsible for protecting local residents against abusive debt purchasers.

Credit card debt is by far the most common kind of debt that is purchased. FTC, *Structure and Practices* at 8. Much purchased debt, including nearly half of purchased credit card debt, is then resold to other debt buyers. Government Accountability Office, *Credit Cards: Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology* 29 (2009).[8] Debt buyers often "purchase portfolios, attempt collection

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[6] Available at https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

[7] Available at http://files.shareholder.com/downloads/PRAA/3783072699x0xS1185348-16-67/1185348/filing.pdf.

[8] Available at http://www.gao.gov/new.items/d09748.pdf.

for a certain period, and then resell accounts for which collection was not successful." *Id.*

This frequent transfer of debts from one collector to another poses additional obstacles to effective state regulation. Consumers receive calls and emails from multiple debt purchasers, one after another, each attempting to collect the same debt. Making matters worse, the Federal Trade Commission has found that "debt sellers typically do not provide dispute history information to buyers at the time of sale." FTC, *Structure and Practices* at 37. The buyer of a debt thus does not know whether the ostensible debtor in fact owes the debt, or even whether the ostensible debtor has previously disputed the debt. *Id.* A single alleged debt can give rise to a series of interactions with different collectors in different states and countries, even where the putative debtor has demonstrated to a prior collector's satisfaction that he is not liable for the debt. It would be hard enough for a state to handle a single collector per debt. The existence of multiple collectors in different states and countries makes the job even more difficult.

Every year, the Consumer Financial Protection Bureau receives more complaints—more than 85,000 in 2015—about debt collection than about any other matter. Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2016* at 17-18.[9] The numbers were similar in earlier years, before the creation of the CFPB, when the FTC had primary enforcement responsibility. FTC,

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[9] Available at http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf.

Collecting Consumer Debts at 67. Policing this industry already exceeded the capacity of the states when the FDCPA was enacted. The dramatic changes in the size and structure of the industry in the last forty years have only exacerbated the inadequacies of state regulation.

C. State law will offer little protection if the FDCPA does not protect consumers against abusive debt purchasers.

In light of the challenges states face in protecting consumers against unscrupulous debt collectors, it is hardly surprising that state law offers weak protection. *See generally* 2 National Consumer Law Center, *Fair Debt Collection* 801-12 (8th ed. 2014).

Eight states (Kansas, Kentucky, Mississippi, Missouri, Montana, Ohio, South Dakota, and Virginia) have no statutes at all regulating the debt collection industry. Five others merely require debt collectors to obtain a license, but provide no substantive protection for consumers. Ala. Code § 40-12-80; Del. Code tit. 30, § 2301(a)(11); Ind. Code §§ 25-11-1-1 to 25-11-1-16; N.J. Stat. §§ 45:18-1 to 45:18-6.1; Utah Code §§ 12-1-1 to 12-1-11.

These thirteen states are entirely reliant on the FDCPA to protect their residents. In Virginia, for example, the state Attorney General's website directs consumers to the FTC's website if they wish to file a complaint. Virginia Office of the Attorney General, *Consumer—Debt Collection.*[10] In Mississippi,

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[10] Available at http://www.oag.state.va.us/13-resource/194-consumer-protection-debt-collection.

the state Attorney General simply informs state residents of their rights under the FDCPA. Mississippi Office of the Attorney General, *A Consumer's Guide to Mississippi Consumer Protection Law* 9.[11]

Of the 37 states that do regulate the conduct of debt collectors in some way, just over half provide consumers with a private right of action. Ark. Stat. § 17-24-512; Cal. Civ. Code § 1788.30; Colo. Rev. Stat. § 12-14-113 (statute will sunset on July 1, 2017, *id.* § 12-14-137); Fla. Stat. § 559.77; Haw. Rev. Stat. § 480D-4; Iowa Code § 537.5201.1(a)(25); Me. Rev. Stat. tit. 32, § 11054; Md. Code § 14-203; Mass. Gen. Laws ch. 93, § 12; Mich. Comp. Laws. § 339.916; N.H. Stat. § 358-C:4; N.C. Gen. Stat. § 58-70-130; Okla. Stat. tit. 15, § 761.1; Or. Rev. Stat. § 646.641; 73 Pa. Cons. Stat. § 2270.5; R.I. Gen. Laws § 19-14.9-13; S.C. Code § 37-5-108(2); Tex. Fin. Code § 392.403; Vt. Stat. tit. 9, § 2461(b); Wash. Rev. Code. § 19.86.090; W. Va. Code § 46A-5-101; Wis. Stat. § 427.105. The rest leave enforcement to the state government.

The lack of a private right of action is a crucial shortcoming, because the enormous volume of complaints means that state governments can pursue only a tiny fraction of abusive debt collectors. As the FTC found, "[b]ecause the Commission receives more than 70,000 third-party debt collection complaints per year, it is not feasible for federal government law enforcement to be the exclusive or primary means of

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[11] Available at http://www.ago.state.ms.us/wp-content/uploads/2013/08/Consumer-Guide-to-Mississippi-Consumer-Protection-Law.pdf.

deterring all possible law violations. Private actions therefore are critical." FTC, *Collecting Consumer Debts* at 67. State agencies, with much less funding and much less power than the FTC or the CFPB, are even less able to enforce the law against unscrupulous debt collectors.

Many state laws exempt large categories of debt collectors that are covered by the FDCPA. Several states exempt banks and similar financial institutions, and some of these exemptions include subsidiaries and affiliates of banks, such as the respondent in this case. *See, e.g.*, Ark. Stat. § 17-24-102(2); Conn. Gen. Stat. § 36a-800(2); Haw. Rev. Stat. § 443B-1; Ill. Stat. c. 225, § 425/2.03(1); Minn. Stat. § 332.32; Neb. Rev. Stat. § 45-602(3); Nev. Rev. Stat. § 649.020(2)(b): Wash. Rev. Code § 19.16.100(5)(c). Several states also exempt lawyers. *See, e.g.*, Idaho Code § 26-2239(1); N.J. Stat. § 45:18-6; N.C. Gen. Stat. § 58-70-15(c)(8); N.D. Cent. Code § 13-05-02.3(1); Tenn. Code § 62-20-103(a)(2).

Moreover, many of these state laws offer weaker substantive protection against abusive debt collection than the FDCPA does. Oklahoma, for example, prohibits debt collectors from using profane language, from filing suit to collect debts that are time-barred, and from using automated dialing at certain hours, but not from the other abuses covered by the FDCPA. Okla. Stat. tit. 15, §§ 753(31), 753(32), 755.1. Louisiana regulates the frequency with which a debt collector may contact a consumer, but barely restricts abusive practices by debt collectors. La. Rev. Stat. § 9:3562. New York prohibits certain communications between debt collectors and con-

sumers, but New York's statute lacks the FDCPA's clear prohibition of specific false, misleading, and deceptive representations. N.Y. Gen. Bus. L. § 601.

The states are largely relying on the FDCPA to protect their residents against abusive debt collectors. Some states do so explicitly. Pennsylvania, for example, simply prohibits violations of the FDCPA. 73 Pa. Cons. Stat. § 2270.4(a). Wyoming, by regulation, has adopted the entire text of the FDCPA as it existed in 2006. Wyo. Regs., Dep't of Audit, Collection Agency Bd., c. 4, § 6. Minnesota, in addition to prohibiting specified practices, likewise provides that a debt collector may not "violate any of the provisions of the Fair Debt Collection Practices Act of 1977." Minn. Stat. § 332.37(12).

Other states have enacted statutes nearly identical to the FDCPA, such as the Arkansas Fair Debt Collection Practices Act, Ark. Stat. §§ 17-24-501 to 17-24-512, and the Rhode Island Fair Debt Collection Practices Act, R.I. Gen. Laws §§ 19-14.9-1 to 19-14.9-14. Because these statutes are likely to be interpreted in tandem with the FDCPA, debt purchasers not covered by the FDCPA will not be covered by state law either.

State law weakness in the field of debt collection is no accident. DBA International, the trade association that "serves as the voice of the debt buying industry," declares that it recently "engaged lobbyists in numerous states, and saw successes in California, Connecticut, Maine, New Hampshire, Washington, and West Virginia, to name a few." DBA Interna-

tional, *Government Advocacy*.[12] The association boasts of a perfect record: "DBA has had a positive outcome on every bill that we negotiated at the state level." *Id.* In state legislatures, as in the marketplace, state regulators are no match for debt purchasers.

If firms that purchase and collect defaulted debt are not "debt collectors" under the FDCPA, consumers will be left exposed to the abusive practices Congress intended to stop. The states are simply not equipped to handle this problem.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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[12] Available at https://dbainternational.org/advocacy.